Supreme Court, U.S.

No.: 01 1870 JUN 21 2002

OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

ADRIENNE COBB, EDDIE OLIVER, TOMMY PERKINS, and NATHALAN PERKINS, *Petitioners*,

v.

ROBERT ROSHTO, RAYMOND E. HOLLOWAY, TERRY E. PITRE, MURPHY J. PAINTER, SAM GARAFOLA, UNKNOWN AIMEE, Agent, JEFF WESLEY, SCOTT JONES, and THE CITY OF DENHAM SPRINGS, LOUISIANA, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for Writ of Certiorari

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49pgs

QUESTIONS PRESENTED

I. May a federal court abuse its discretion in declining to exercise its jurisdiction pursuant to 28 U.S.C.A. § 1367?

II. May a federal court automatically grant a motion for summary judgment without acknowledging that the moving party met its burden of demonstrating that no genuine issue of material fact existed and that it was entitled to judgment as a matter of law?

III. Must a final adjudication of an administrative proceeding be reached before a Plaintiff may claim relief pursuant to 42 U.S.C.A. § 1983?

IV. May a public official's refusal to comply with a court order be excused under the defense of qualified immunity?

PARTIES TO THE PROCEEDING

The following individuals are parties to the proceeding in the court below:

Adrienne Cobb, Eddie Oliver, Tommy Perkins, Nathalan Perkins; *Plaintiffs-Appellants*;

Robert Roshto, Raymond Holloway, Terry E. Pitre, Murphy J. Painter, Sam Garafola, Agent Mike Aimee, Jeff Wesley, Scott Jones, City of Denham Springs, Louisiana; *Defendants-Appellees*.

CORPORATION DISCLOSURE STATEMENT

No parties hereto are corporations. Sup. Ct. R. 29.6.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Adrienne Cobb, Eddie Oliver, Tommy Perkins, and Nathalan Perkins respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinions of the Court of Appeal for the Fifth Circuit (App. A) and the District Court for the Middle District of Louisiana (App. B) are not yet reported.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 26, 2002. (App. A). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution provides that no "State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S.C.A. Const. Amend. XIV. Further, 42 U.S.C.A. § 1983 provides that every person acting under color of any statute, who causes any individual to be deprived of rights, privileges, or immunities, is liable to the injured party. 42 U.S.C.A. § 1983. Additionally, 42 U.S.C.A. § 1985 prohibits two or more persons from conspiring with the intent to deny to any citizen the equal protection of the laws. 42 U.S.C.A. § 1985.

28 U.S.C.A. § 1367 provides that, "in any civil action of which the district courts have original

jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." The court's decision to decline jurisdiction is discretionary, not mandatory. 28 U.S.C.A. § 1367.

STATEMENT OF THE CASE

For approximately thirty years, Petitioner Tommy Perkins has owned a premises located at 436 Summer Street in the city of Denham Springs, Louisiana. Since approximately 1974, said Mr. Perkins has held a permit to sell alcoholic beverages thereupon.

On said premises stand two separate buildings. The building which stands nearer to the street was divided so as to accommodate two businesses. The addresses of said businesses, hence, became 436 A Summer Street and 436 B Summer Street. 436 A Summer Street was leased to Bay Lane, Inc., a corporation owned by Mr. Tommy Perkins through which he operated a restaurant and bar. The remaining portion of this building, 436 B Summer Street, housed Mr. Perkins' private office from which he operated a motel, which was also located on the premises.

I. The First Denial.

In 1992, Mr. Perkins sold 436 A Summer Street to his son-in-law, Larce Spikes, who obtained a permit authorizing him to operate the restaurant and bar. This portion of the property was again sold, in 1993, to Petitioner Eddie Oliver. However, upon Mr. Oliver's attempting to secure a license to serve alcoholic beverages, the Office of Alcoholic Beverage Control, (hereinafter referred to as "ABC"), a division of the Department of Public Safety and Corrections of the State

of Louisiana, denied his application alleging that the premises for which the application was sought was within three hundred feet of a playground and, thus, by ordinance, he was prohibited from selling alcoholic beverages at that location.

This denial was appealed to Louisiana's Twenty-First Judicial District Court, at which time the ABC entered into a stipulation that the premises, at that time owned by Mr. Oliver, was greater than three hundred feet from the playground. Judgment to that effect was entered by said state district court, and no appeal was taken therefrom by any party.

II. The Second Denial.

On or about January 13, 1995, Mr. Oliver sought, again, to renew his license for Oliver's Restaurant and Lounge. Thereafter, he, again, received a denial from the ABC for the stated reason that the premises in question was within three hundred feet of a playground. As with the previous denial, this matter was appealed to the same state district court, which ruled this issue *res judicata*, in light of its previous judgment. Thereafter, the ABC appealed the district court's ruling to Louisiana's First Circuit Court of Appeal.

The state court of appeal affirmed the district court's ruling that the issue of the distance between Mr. Oliver's premises and the playground was in excess of three hundred feet. Rehearing was denied on March 29, 1996.

During the pendency of this matter and the appeals taken therefrom, Mr. Oliver's business was forced to remain closed. Thus, in April of 1996, Mr. Oliver sold the premises back to Mr. Tommy Perkins.

III. The Retaliatory Harassment.

In April of 1996, the ABC contacted Mr. Perkins, who was, once again, the owner of the premises, and

informed him to apply for a liquor license, assuring him that there would be no opposition from the ABC. This communication was followed by a meeting in which ABC's counsel and an agent thereof met with Mr. Perkins and his office manager. During this meeting, the ABC represented to Mr. Perkins that there would be no problems in the application process and that they would assist him in his efforts. That same month, Mr. Perkins sold the business to his granddaughter, Petitioner Adrienne Cobb, who subsequently sought a permit from the state ABC as well as the City of Denham Springs Office of Alcoholic Beverage Control.

On April 29, 1996, the state ABC petitioned the Louisiana State Supreme Court for a supervisory writ to review the decision of the state appellate court, thus reopening the issue of the distance between the premises and the playground. That same day, Respondent Agent Mike Aimee of the ABC presented himself, unannounced, at the premises and, without a warrant, demanded access.

During this purportedly "official stop," Agent Aimee entered 436 B Summer Street, which, as previously stated, is a motel owned by Mr. Perkins and also includes Mr. Perkins' private office. Agent Aimee ordered that certain doors and locked cabinets in Mr. Perkins' office be opened. He further ordered that the motel rooms be opened as well.

Labeling his findings as "contraband," Agent Aimee summoned the Denham Springs Office of Alcoholic Beverage Control to seize the liquor found in Mr. Perkins' office during the search. Mr. Perkins was issued three summonses to appear before the Denham Springs City Court for three alleged violations of Louisiana's statute regarding alcoholic beverages. Mr. Perkins was also, on April 29, 1996, ordered by the Denham Springs ABC to appear on before Respondent Jeff Wesley, the chairman, and other persons representing and/or purportedly acting on behalf of the

City of Denham Springs ABC. It should be noted that the search and seizure by Agent Aimee was later ruled unconstitutional as the items seized were not found on the licensed premises and did not form a basis for any charges against Mr. Perkins. Thus, the criminal proceedings against Mr. Perkins were quashed on January 7, 1997. The state district court further ordered that the items seized from the illegal search in April of 1996 be returned. As late as March of 1997, Respondent, Chief Jeff Wesley of the City of Denham Springs Police Department refused to comply with this order.

After being ordered a second time to return the seized liquor, Chief Wesley continued to resist. It then became necessary for Mr. Perkins' counsel to travel to the Denham Springs Police Station to convince them to release Mr. Perkins' property.

On May 1, 1996, the Denham Springs ABC held its first administrative hearing on its sanctioning of Mr. Perkins. Testimony was taken from Agent Mike Aimee. However, due to the inadequacy of the notice given to Mr. Perkins, the hearing was continued until May 7, 1996. On that date, the Denham Springs ABC held its second such hearing, which was similarly continued until May 28 of that year. In the interim, on May 9, 1996, Agent Aimee returned to the 436 A Summer Street address to, once again, investigate Ms. Cobb's business.

On May 20, 1996, Ms. Cobb submitted her application for her liquor license, having completed paperwork for both the Denham Springs and the state offices of alcoholic beverage control. It should be noted, at this point, that one of the established justifications for the denial of a permit is an unsuitable criminal record.

On May 21, the day after submitting said application, Respondent Lieutenant Scott Jones, while acting under color of state law, obtained a search warrant, upon his own affidavit, to search Ms. Cobb's

home. According to said affidavit, a reliable confidential informant, one Charles Ray Scott, had given a tip that Ms. Cobb was selling crack cocaine from her home and that this informant had purchased cocaine from her using a marked twenty-dollar bill issued to him on that date. However, the signature used on the informant's statement did not match his signature on other statements given to police in other matters. Further, the allegedly marked twenty-dollar bill was not available for production.

When deposed, Charles Ray Scott, the alleged confidential informant upon whose statement Lieutenant Jones' affidavit for the search warrant was based, testified that he had never purchased cocaine from Ms. Cobb. He further testified that he had never told Lieutenant Jones that he had purchased cocaine from her.

Pursuant to this warrant, Lieutenant Jones apprehended Ms. Cobb as she was on a public highway in an automobile being driven by a friend. This stop was not made on the premises of Ms. Cobb's home. When she informed Lieutenant Jones that she did not intend to go home, she was threatened with arrest for resisting arrest. Thereafter, Ms. Cobb was handcuffed and forced into Lieutenant Jones' patrol unit. She was then transported, against her will, to her home, wherein a search was commenced after Lieutenant Jones took her keys. No warrant was ever presented to Ms. Cobb. Further, Ms. Cobb was never advised of her *Miranda* rights, informed of why she was arrested, or afforded an opportunity to obtain counsel.

Pursuant to this search, Lieutenant Jones claimed to have found narcotics; he then proceeded to arrest Ms. Cobb, who posted bond later that evening. This situation presented significant humiliation to Ms. Cobb, whose mother is an employee at the jail.

On May 22, 1996, Agent Aimee returned to Ms. Cobb's premises at 436 A Summer Street to allegedly

sketch a floor plan. While there, he mentioned to Ms. Cobb that he had heard that she had been arrested the night before. He informed her that he was going to have to issue the license to her, but, if she were found guilty of the charges, she would lose the license. On October 24, 1996, the Office of the District Attorney rejected the charges against Ms. Cobb due to a lack of evidence.

On May 31, 1996, the Louisiana Supreme Court denied the state ABC's writ application on the matter in which Mr. Oliver had sued regarding the *res judicata* issue of the distance between the premises at 436 A Summer Street and the public playground. On June 3, 1996, the City of Denham Springs ABC issued its formal notice of a hearing to determine whether the retail dealer's alcohol permit should be suspended or revoked, citing the statutory violations under which the City had initially brought criminal proceedings against Mr. Perkins. Mr. Perkins objected on various grounds including the City of Denham Springs ABC's lack of statutory authority to proceed. On June 20, 1996, Mr. Perkins made a final appeal to the mayor of Denham Springs to reset the hearing, which had been set for June 24, due to the fact that Mr. Perkins' counsel was unavailable on that date. This request was denied.

On June 21, 1996, Mr. Perkins was able to obtain a temporary restraining order against the City of Denham Springs ABC enjoining them from taking any further action against him. However, by operation of law, this order lapsed on July 1, 1996. On July 16, 1996, the matter was further continued until August 13, 1996.

On July 23, 1996, Mr. Perkins obtained a second temporary restraining order against the Denham Springs ABC enjoining them from taking any further action against him while he was waiting for a hearing for a final injunction. On September 23, 1996, the state district court granted such a final injunction against the Denham Springs ABC, finding that the Denham Springs

ABC was not authorized by law to act. As a result of the court's finding that it was illegally constituted, the Denham Springs ABC disbanded, and all proceedings initiated against Mr. Perkins were discontinued.

Pursuant to Louisiana's Revised Statute 26:87, the state ABC and the City of Denham Springs were required to act on Ms. Cobb's application within thirty-five days of its May 20, 1996 submission. Ms. Cobb and Mr. Perkins contacted the state ABC and the City of Denham Springs on numerous occasions seeking action on the application. On August 15, 1996, Ms. Cobb received a letter from the state ABC, once again, denying her permit on the stated basis that her business was too close to a public playground. On August 21, 1996, Mr. Perkins and Ms. Cobb were forced to seek a writ of mandamus compelling the state ABC and the City of Denham Springs to act.

On September 23, 1996, the state district court issued the writ of mandamus to the City of Denham Springs to act on the application. Thereafter, the mayor and the board of aldermen granted the permit; however, on October 23, 1996, despite the City's granting of the permit, the City of Denham Springs appeared and participated in the appeal of the state ABC's denial of the application. At the close of the hearing on this matter, the state court concluded that there was no evidence presented to support the allegation that 436 A Summer Street was less than three hundred feet from the playground. The court further assessed costs equally to the state ABC and to the City of Denham Springs; however, for some two years, the City refused to pay said costs.

On December 5, 1996, the state ABC granted her permit. This was followed by the City of Denham Springs' granting of a permit on December 10, 1996.

On February 25, 1997, Petitioner Nathalan Levon Perkins, daughter of Petitioner Tommy Perkins, was employed by Ms. Cobb and was working at A.C.'s

Restaurant and Lounge, which was operating from the 436 A Summer Street premises. During the evening hours, Ms. Perkins took a break and went to a nearby McDonald's for a meal. While at McDonald's, she was apprehended by Respondent Lieutenant Jones and forced to accompany him back to A.C.'s to get her keys and then to her home, for which he had obtained a search warrant, purportedly based upon information provided to him by a confidential informant, again, Mr. Charles Ray Scott, who was supposed to have purchased crack cocaine from Ms. Perkins. Similar to Lieutenant Jones' apprehension of Ms. Cobb, Ms. Perkins was never advised of her *Miranda* rights, informed of why she was arrested, or afforded an opportunity to obtain counsel.

When Lieutenant Jones and the six other police officers arrived at Ms. Perkins' home, they went on a two-hour rampage throwing clothing from drawers and otherwise disrupting the home. At one point, Lieutenant Jones discovered a photograph of Ms. Perkins in the nude; he then called the other officers in to view it, further humiliating her. This was compounded by lewd comments made to Ms. Perkins by another of the officers after viewing the photograph. It should be noted that no crack cocaine was found.

Being that a mostly burnt marijuana joint, or "roach" was found in this illegal search, Ms. Perkins was handcuffed and transported to jail. Upon arrival, she was confined to a pole for approximately three hours during which she was told that, just because she was a Perkins, she did not have special privileges, and that she was going to jail.

Thereafter, Lieutenant Jones repeatedly failed to appear in court proceeding pertaining to the prosecution of Ms. Perkins. This resulted in the dismissal of the charges that had been brought against her as a result of her arrest by Lieutenant Jones.

IV. The Proceedings Below.

On July 9, 1998, Adrienne Cobb, Eddie Oliver, Tommy Perkins, and Nathalan Perkins instituted suit asserting violations of civil rights by the City of Denham Springs, Chief Wesley, Lieutenant Scott Jones, the Office of Alcoholic Beverage, Robert Roshto, et al. On August 10, 1998, the action was re-allotted from Judge Polozola to Judge Ralph Tyson. On June 29, 1999, an order was entered establishing final deadlines.

On November 8, 1999, due to the death of Petitioner Eddie B. Oliver, his living heirs were allowed to substitute as party plaintiffs. On November 15, 1999, Mr. Roshto was granted an extension of time to file a motion for summary judgment because discovery was incomplete.

On November 30, 1999, Mr. Roshto filed a Motion for Summary Judgment alleging prescription, failure to state a constitutional violation, insufficient relation between acts to allege violations of constitutional rights, and qualified immunity. On January 27, 2000, Plaintiffs filed an opposition to Mr. Roshto's motion asserting genuine issues of material fact and challenged Mr. Roshto's defense of qualified immunity.

On February 24, 2000, this action was reassigned to Judge Peter H. Beer and transferred to the district court for the Eastern District of Louisiana.

On March 30, 1999, the City of Denham Springs, Jeff Wesley and Scott Jones were granted leave to file a 40 page memorandum for motion for partial summary judgment. On March 24, 2000, the City of Denham Springs, Jeff Wesley and Scott Jones filed a motion seeking partial summary judgment. On March 31, 2000, Petitioners, in turn, sought an extension to respond to the summary judgment, asserting the excessiveness of that Defendant's motion.

On June 14, 2000, the trial court entered an order providing for oral argument on June 21, 2000 in Baton Rouge. On June 15, 2000, the Plaintiffs filed a cross motion for summary judgment and an opposition

to the summary judgment of the City of Denham Springs, Jeff Wesley and Scott Jones and cross motion for summary judgment. On June 20, 2000, the trial court granted leave to Plaintiffs to amend their petition to add a party plaintiff, Bay Lane Inc. the alter ego of Tommy Perkins, asserting that, up until their filing of the motion for summary judgment, the Defendants had never raised the issue of improper party regarding the claim damages arising from the ownership of 436 Summer Street.

On June 21, 2000, the summary judgments were argued to the bench, at which time the trial court struck plaintiffs' cross motion for summary judgment as untimely. On June 22, 2000, Petitioners sought and on July 11, 2000 were granted leave for leave to file a post-hearing brief regarding city liability.

On June 27, 2000, the trial court entered its *Order* wherein all claims were dismissed except those arising under 42 USC §1983. On July 10, 2000, the trial court entered its *Order* granting in part and denying in part the motion for partial summary judgment of City of Denham Springs, Lieutenant Scott Jones, and Chief Jeff Wesley, and granting the motion for summary judgment of Mr. Robert Roshto.

On July 17, 2000, Petitioners filed a notice of appeal. On July 24, 2000, the trial court denied Plaintiffs motion for reconsideration from the June 21, 2000 *Order*. On December 21, 2000, the trial court granted the Petitioner's motion to certify orders of June 22, 2000 and July 1, 2000 for appeal. On January 15, 2001, Plaintiffs filed notice of appeal. This matter was then submitted to the Fifth Circuit Court of Appeals under Docket Number 00-31008.

On March 2, 2001, Petitioners submitted their original brief to the Fifth Circuit Court of Appeals. On March 28, 2001, Respondent Robert Roshto set forth his reply in his original brief to the Fifth Circuit. This was followed by the April 3, 2001 filing of the original brief of

Respondents Chief Jeff Wesley, Lieutenant Scott Jones, and the City of Denham, Springs.

On April 11, 2001, Petitioners filed their reply to the brief of Respondents Wesley, Jones, and the City. Thereafter, on April 17, 2002, Petitioners submitted their response to the brief submitted by Mr. Roshto. The matter was then set for oral argument on February 7, 2002.

On March 26, 2002, the Fifth Circuit, Judges Jones, Wiener, and Parker, issued its ruling. Writing for the appellate court, Judge Edith H. Jones affirmed the district court's granting of summary judgment on the § 1985 conspiracy claims raised by Petitioners Tommy Perkins and Nathalan Perkins; the granting of summary judgment on Tommy Perkins' § 1983 claims against the Denham Springs Defendants citing the qualified immunity of Chief Wesley; and the grant of summary judgment on Nathalan Perkins'§ 1983 claims other than the Fourth Amendment claims arising from her arrest and the search of her home, including her claims of Fifth and Sixth Amendment violations in connection with her arrest and for lost wages while Mr. Perkins' lounge was shut down.

The court of appeals further affirmed the district court's decision to remand the Petitioners' state law claims to the state court and the dismissal of Petitioner Eddie Oliver's claims except those against Respondent Robert Roshto. The Fifth Circuit did, however, reverse and remand the grant of summary judgment to Robert Roshto on the grounds of prescription as well as the district court's dismissal of the § 1988 claims of the Petitioners.

REASONS FOR GRANTING THE PETITION

In its handling of this matter, the appellate court has sanctioned and endorsed the district court's departure from the accepted and usual course of judicial

proceedings. For this compelling reason, exercise of this Honorable Court's supervisory power is appropriate to safeguard the rights of the Petitioners herein.

Regarding the Plaintiffs' claims against Chief Wesley, Lieutenant Jones, and the City of Denham Springs, the trial court stated that "Plaintiffs have fired [a] Section 1983 buckshot at the Denham Springs Chief of Police, a Denham Springs police officer, and the City of Denham Springs, (the Denham Springs defendants) claiming numerous civil rights violations arising out of [the] [P]laintiffs' attempts to renew a liquor license." (See App. B, Page 4). This observation by the trial judge may be explained by the fact that this matter was re-allotted on two previous occasions, making this the third trial judge to preside over this matter. Further, this matter was set for oral argument before the Petitioners had the opportunity to file their briefs in opposition, thus evidencing the trial court's having made its decision prior to assessing the Petitioners' contentions or hearing counsels' arguments on the issues. In any event, the obvious fact remains that the numerosity of the claims asserted in no way should serve to diminish the seriousness thereof and the harm occasioned thereby.

The ruthless actions of the Denham Springs defendants may only be characterized as a concerted effort to violate the constitutional rights of the Petitioners. At best, said defendants may only plausibly argue that said acts are an abuse of process. In either scenario, the undeniable result of the Denham Springs defendants' scheme is that the rights of the Petitioners to equal protection under the law were obliterated.

What motives said defendants had in initiating this systematic distortion of legal authority to the detriment of the Petitioners is unclear. What steadfastly remains, throughout the course of events leading the parties to the present juncture, is that the humiliation, the harassment, and the unwarranted persecution to which the Petitioners were subjected grossly offends the

principles of justice upon which the American notion of liberty was founded.

I. The court of appeal endorsed the trial court's abuse of discretion and misapplication of 28 U.S.C.A. § 1367 in remanding the entirety of state law claims while maintaining federal claims.

In affirming the trial court's decision to remand the Petitioners' state law claims to the state court, the appellate court adopted the error committed by the district court. 28 U.S.C.A. §1367(a) provides that, "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties." 28 U.S.C.A. §1367(a). Although, whether or not to exercise this jurisdiction is largely left to the discretion of the district court, as is provided in 28 U.S.C.A. § 1367(c)(2), when issues of state law predominate, this Court has instructed that district courts should deal with cases involving pendent claims in the manner that best serves the principles of economy, convenience, fairness, and comity which underlie the pendent jurisdiction doctrine. City of Chicago v. International College of Surgeons, 522 U.S. 156, 118 S.Ct. 523, 139 L.Ed.2d 525 (12/15/97), citing Carnegie-Mellon University v. Cohill, 484 U.S. 343, 357, 108 S.Ct., 614, 623, 98 L.Ed.2d 720 (1988).

In support of its affirmation of the district court's declining jurisdiction over the Petitioners' state law claims, the appellate court cites the case of Bass v. Parkwood Hospital, 180 F.3d 234 (5th Cir. 7/1/99). In

affirming the dismissal of the plaintiff's claims due to the disposal of all federal question pending before the court, the court of appeal, nevertheless, noted that "this fact does not divest the court of jurisdiction: instead, the court must exercise its discretion whether to exercise supplemental jurisdiction over Bass's state law claims." Bass, at 246. This discretion to which the court of appeal refers has been addressed on numerous occasions by this and other circuits.

In the matter of In re Abbott Laboratories, 51 F.3d 524 (5th Cir. 4/24/95), a case which involved allegations of infant formula price-fixing, the Fifth Circuit Court of Appeal reasoned that the trial court's refusing to exercise supplemental jurisdiction over the unnamed plaintiffs' claims in that matter "reflects respect for considerations of comity, but it assumes that the claims of the class representatives were to be remanded to state court." "The [district] court must now adjudicate claims of the class representatives -- including the same novel and complex state law issues the district court preferred to leave to Louisiana." The Fifth Circuit concluded that the interests of comity will not be served by declining to exercise supplemental jurisdiction over the class members whose claims do not meet the jurisdictional amount. For that reason, it vacated the district court's order remanding the claims to the state court and remanded the matter back to the district court. 51 F.3d at 530.

In Batiste v. Island Records Inc., 179 F.3d 217, 226-27 (5th Cir. 1999), Judge King, writing for that Court, found that the proper standard of review of a district court's decision to decline jurisdiction over pendent state law claims is for an abuse of discretion. Batiste, however, involved a case where all claims save certain state law claims were dismissed; thus, the inquiry in that case fit neatly into the § 1367 (c)(3) exception, and this Court nevertheless found that failure to exercise pendent jurisdiction under the fact of that

case constituted an abuse of discretion. Nevertheless, in an action, such as the present, where the exceptional circumstances of subsection (c)(1-4) are not present, the standard of review should be de novo as applied to errors of law. Unless one of the subparts (1-4) of subsection (c) applies, § 1367 mandate pendent jurisdiction.

In Executive Software North America v. United States District Court, 24 F. 3d 1545 (9th Cir. 5/16/94), the plaintiff brought an employment discrimination suit against her employer under Title VII, 42 U.S.C.A. § 1983, and state law alleging that Executive Software required its employees to study the teachings of the Church of Scientology. After the action was removed to federal court, the district court remanded the state claims to the state court pursuant to what the district judge understood to be his discretion. See Id. at 1548. The court of appeals reversed, holding that the district court committed clear error in declining supplemental jurisdiction.

Discussing the 28 U.S.C.A § 1367 presumption toward adjudication of state claims, Judge Nelson, 24 F.3d at 1555, read Section 1367(a)'s use of "shall" as "confer[ring] power to entertain supplemental jurisdiction in mandatory terms" and he noted that jurisdiction may be declined only in one of the four specific circumstances enumerated in subsection (c). As this interpretation contradicted the common law doctrine, the court turned to the legislative history to support its deference to statutory construction. The court wrote, 24 F.3d at 1556:

> By selecting this statutory structure [the use of "shall" in subsection (a) and "may" in subsection (c)], it is clear that Congress intended section 1367 (c) to provide the exclusive means by which supplemental jurisdiction can be declined by a court. Not

only is this conclusion supported by the legislative history, but a contrary reading of the statute would appear to render section 1367 (c) superfluous.

The Court also referenced Growth Horizons, Inc. v. Delaware County, 983 F.2d 1277, 1285 n.14 (3rd Cir. 1993); Godfrey v. Perkin-Elmer Corp., 794 F. Supp. 1179, 1184 (D. N.H. 1992); Cedillo v. Valcar Enters. & Darling Del. Co., 773 F. Supp. 932, 939 (N.D. Tex. 1991), as expressing a similar understanding of both the statute and its legislative history. With the support of Congress and other courts, the Ninth Circuit suggested that federal courts must adjudicate supplemental claims unless one of subsection (c)'s factual predicates existed.

Judge Nelson reasoned, 24 F.3d at 1557, that "By codifying preexisting applications of Gibbs[1] in subsections (c)(1)-(3) . . . it is clear that Congress intended the exercise of discretion to be triggered by the court's identification of a factual predicate that corresponds to one of the section 1367 (c) categories." If none of the predicates are present, a court may not remand the state claims to state courts for efficiency reasons alone, as the lower court did in both Executive Software and in the present case. Overturning the lower court's decision, 24 F.3d at 1560, the Executive Software court found that "the lower court did not rely on the statute, but [instead on] Gibbs."

In the matter *sub judice*, the trial court was quoted as stating, "that's all that I, as of today, have jurisdiction over, having divested myself of any pendent jurisdiction for a number of reasons, all of which I don't propose to go into in any great detail other than to say that that is the way that the court will manage this case." Clearly, this statement connotes the trial court's erroneous failure to adhere to the provisions of § 1367,

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[1] United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966).

much less the ample jurisprudence both persuasive and binding. As such, the appellate court fell into similar error in affirming the trial court's decision.

Therefore, in light of the statutory provisions and the ample jurisprudence derived therefrom, the lower courts in this matter clearly fell into error in remanding the state claims to the Louisiana courts. Due to this deviation, the granting of certiorari is appropriate. Further, said granting will provide this Court an opportunity to more clearly define the standard to be employed for determining whether a district court has abused its discretion in declining to exercise its jurisdiction when confronted with a similar factual scenario.

II. The appellate court erred in affirming the trial court's granting of summary judgment on § 1985 conspiracy claims raised by Petitioners Tommy Perkins and Nathalan Perkins.

The court of appeals acknowledged that the district court implicitly granted summary judgment on the claims raised by Petitioners Tommy and Nathalan Perkins; however, with respect to those claims of Petitioner Adrienne Cobb, summary judgment was not entered being that issues of material fact precluded such.

The conspiracy alleged was asserted on behalf of all Plaintiffs. The Plaintiffs have argued and asserted that Mr. Perkins was the target of a conspiracy to force him out of business. Given the facts of this case, conventional wisdom dictates that, if questions of fact exist as to Ms. Cobb's conspiracy claims, then questions of fact must exist as the conspiracy claims asserted by The remaining Plaintiffs, including Mr. Perkins. The trial court, however, never specifically discussed Mr. Perkins' conspiracy claim and offered no explanation or legal basis for dismissing the § 1985 claims of Ms.

Perkins and Mr. Perkins.

This Court, in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), has established that the standard for granting summary judgment mirrors the standard for a directed verdict, which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. Supra, at 250, 2511. On a motion for summary judgment, disputed issues of fact are resolved against the moving party. General Electric Company v. Joiner, 522 U.S. 136, 143, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997).

In its treatment of the § 1985 claims of Petitioners Tommy and Nathalan Perkins, neither the trial court nor the appellate court offered any substantive reason for granting summary judgment. The appellate court merely contends that the Petitioners herein have failed to produce sufficient evidence to establish a conspiracy existed to deprive them of their right to equal protection under the law. (App. A, Page 2).

The jurisprudence of this Court mandates that, on summary judgment, the inferences to be drawn from the underlying facts contained in the moving party's materials must be viewed in the light most favorable to the party opposing the motion. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158, 90 S.Ct. 1598, 1609 citing United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 994, (1962). Without addressing whether the Defendants had met their burden, the lower courts shifted the burden to the Petitioners and summarily dismissed their claims based upon the allegation that the Petitioners had failed to offer an adequate rebuttal.

For this reason, the lower courts fell into error in granting this motion for summary judgment. Further, the lower courts' deviation from the commonly established method of addressing a motion for summary judgment constitutes a significant departure from the well-established flow mandating that the initial burden

rests with the mover, which, if said party has established that no issue of material fact exists and said mover is entitled to judgment as a matter of law, shifts to the non-moving party. As such, certiorari is proper to remedy this irregularity.

III. The appellate court erred in affirming the district court's grant of summary judgment dismissing Petitioners Tommy Perkins' and Nathalan Perkins' § 1983 claims against the Denham Springs defendants arising from the local administrative proceedings.

On this issue, the trial court found as follows:

> All allegations by Tommy Perkins against the City of Denham Springs, Chief Wesley, and Scott Jones arising out of the administrative proceedings instituted by the City of Denham Springs are dismissed as a matter of law because Perkins has failed to come forth with evidence to suggest a constitutional deprivation. It is undisputed that there was never a hearing on this matter by the Denham Springs ABC and as such, there could not have been any constitutional deprivations resulting therefrom. Accordingly, those claims are dismissed and the Court turns to the only remaining viable claim by Perkins . . .

Considering that oral arguments were set before Plaintiffs even filed their opposition brief, the trial court failed to review Plaintiffs' evidence before reaching its conclusion on this issue. Plaintiffs produced proof on this issue demonstrating that, not only was Mr. Perkins subjected to ongoing administrative proceedings, but

that was compelled to take legal action to protect his rights including but not limited to obtaining a temporary restraining order, preliminary injunction, final injunction, and judgment declaring the Denham Springs ABC to be illegally constituted.

The facts cited above are abundantly supported by evidence:

- On May 1, 1996, the City of Denham Springs ABC held its first administrative hearing on revocation proceedings against Mr. Perkins. Agent Aimee was present and testified. The Denham Springs ABC recognized that its notice of hearing was improper and set a formal hearing on May 7, 1996.

- On May 7, 1996, the City of Denham Springs ABC held a second formal administrative revocation hearing for purpose of sanctioning Mr. Perkins. The City of Denham Springs ABC insisted upon holding the administrative hearing before the criminal matter even though being warned that such may be in violation of due process and Mr. Perkins' 5th Amendment right.

- On May 28, 1996, the City of Denham Springs ABC held a meeting to discuss a letter submitted on behalf of Mr. Perkins which provided:

> The notice fails to place Mr. Perkins on notice of the specific action that the Denham Springs ABC seeks to take, the statute or ordinance that Mr. Perkins has allegedly violated and **the statutory authority of the Denham Springs ABC to take any action on such matter.**

- On June 3, 1996, the City of Denham Springs ABC issued a formal notice of hearing "to determine whether or not the retail dealers alcohol permit . . . should be suspended or revoked" citing the exact same criminal statute violations under which the City of Denham Springs had instituted criminal proceedings against Mr. Perkins. Mr. Perkins again objected on various grounds one of which was the lack of the statutory authority for the City of Denham Springs ABC to proceed.

- On June 20, 1996, Mr. Perkins made a final appeal to the Mayor of Denham Springs to continue the June 24, 1996, administrative hearing because his counsel was not available on that date, which request was denied.

- On June 21, 1996, Mr. Perkins obtained a TRO against the City of Denham Springs ABC Board from taking further action against Mr. Perkins.

- On June 24, 1996, a member of the Denham Springs ABC Board declared that the "court ordered signed by Judge Jeffrey D. Hughes [state court judge issuing TRO] is invalidate." In the meantime, the D.S. ABC, which had no statutory authority to act and without the authority of law, continued the administrative hearing process to August 13, 1996.

- On July 16, 1996, the Denham Springs ABC set a date for an administrative hearing against Mr. Perkins for August 13, 1996. On July 18, 1996, since by state law a temporary restraining order (TRO) lapses in ten days, via certified mail the Denham Springs ABC issued yet another notice of hearing setting an evidentiary hearing before

Chief Wesley for August 13, 1996, 10:00 a.m.

- On July 23, 1996, Mr. Perkins obtained a second TRO against the City of Denham Springs ABC Board from taking further action against him while he was waiting for a hearing on a final injunction.

- On September 23, 1996, the 21st JDC in and for the State of Louisiana granted a final injunction against the Denham Springs ABC after finding the Denham Springs ABC was not authorized by law to act. Being illegally constituted, the Denham Springs ABC was disbanded and all proceedings instituted by the Denham Springs ABC against Mr. Perkins were discontinued.

Thus, it was legal error for the trial court to find "that there was never a hearing on this matter." This finding is offensive to this Court's holding in City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988), in which this Court found that, in order to state a claim for municipal liability under § 1983, a plaintiff's injury must be caused by a municipal policy promulgated by an individual having final decision-making authority. Final administrative action was precluded only because Mr. Perkins was able to obtain a permanent injunction against the City. To the extent that the trial and appellate courts may have found that, in the absence of final administrative disposition, no cause of action lies, such is a finding of a difference without a distinction. Mr. Perkins was compelled, at his expense, to obtain this injunction to prevent final adjudication.

In Meadowbriar home for Children, Inc. v. Gunn, 81 F.3d 521, 532-533 (5th Cir. 1996), the Fifth Circuit set forth four elements of proof on a § 1983 claim against a municipality as follows:

> Municipalities and cities qualify as persons liable to suit under § 1983.[2] If a § 1983 suit is brought against a city, the claim must be based upon the implementation or execution of a policy or custom which was officially adopted by that body's officers.[3] To support a claim based upon the existence of an official custom or policy, the Plaintiff must lead facts which show that 1) a policy or custom existed; 2) the governmental policymakers actually or constructively knew of its existence; 3) a constitutional violation occurred; and 4) the custom or policy served as the moving force behind the violation.[4]

Further enunciating the "official policy" language, the Fifth Circuit, in Matthias v. Bingley, 906 F.2d 1047, 1054 (5th Cir. 1990) (citing Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984)) explained:

> Official policy is:
> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or

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[2]Citing Monell v. Dept of Social Services, 436 U.S. 658, 98 S.C 1028, 56 L.Ed.2d 611 (1978).

[3]Citing Krueger v. Reimer, 66 F.3d 75, 76 (5th Cir. 1995).

[4]Citing Palmer v. City of San Antonio, 810 F.2d 514, 516 (5th C 1987)

> 2. A persistent, widespread practice of city officials or employees, which, although not authorized by official adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body has delegated policymaking authority. Actions of officers or employees of a municipality do not render the municipality liable under Section 1983 unless they execute official policy as above defined.

The enactment and actions of the Denham Springs ABC undeniably fit both prongs of this test. This board was enacted and adopted by the City of Denham Springs, and the actions of Chief Wesley, Agent Aimee, Lieutenant Jones, and the City of Denham Springs were well known in their promotion of the City's agenda.

As a result of the ruthless efforts of these defendants, Mr. Perkins incurred significant legal costs associated with the defense on the charges lodged against him and the loss of rental income occasioned by the repeated delay in acting on the application of Ms. Cobb. Obviously, Ms. Cobb suffered from a loss of income as well. In addition, both have suffered general damages as a result of the stigma placed upon them as a result of the frivolous charges and harassment by the Denham Springs defendants.

Moreover, the City of Denham Springs and Chief Wesley, through the Denham Springs ABC pursued a consistent course of action against Mr. Perkins. Mr. Perkins' constitutional rights to due process, equal protection, right to notice, and to be free from malicious

prosecution were violated. The Denham Springs ABC and Chief Wesley had no jurisdiction to proceed against Mr. Perkins, and it was not reasonable, in the absence of statutory authority, especially where these matters were initially indicated, for these defendants to have thought differently or to have continued in their course of action.

Such actions of local authority are clearly in violation of the protections afforded to all persons under the Constitution of the United States. The appellate court's affirmation of the district court's apparent endorsement of these acts clearly qualifies as a gross deviation from the well-established function of the judiciary.

IV. Chief Jeff Wesley's refusal to return the property seized despite being ordered to do so by the state court does not qualify as "reasonable" so as to support a defense of qualified immunity.

With regard to Chief Wesley's action concerning the seized liquor, the fact that Chief Wesley did not personally seize the liquor, while troublesome, has never been the sole crux of Plaintiffs' complaint. The primary focus of the Petitioners' claim as it relates to Chief Wesley is his steadfast refusal and inexcusable delay in returning the wrongfully seized property. Plaintiffs were inconvenienced and offended that the City would refuse to return the seized property even after being ordered to do so by the court. While there is insufficient guidance in statute regarding compliance with a court order directing the return of seized property although, adherence to the order should impact the defense of qualified immunity and what is deemed to be a reasonable action by a state agent.

In Reitz v. County of Bucks, 125 F.3d 139 (3rd Cir. 1997), the Court faced a similar situation where

prosecutors defied a court order to return seized property. The Court analyzed the defense of qualified immunity by applying the two-prong theory outline in Karnes v. Skrutski, 62 F.3d 485 (3rd Cir. 1995), which required ascertaining whether the law was clearly established at the time of the alleged violation, ***and*** whether under the existing law an officer reasonably could have believed the conduct to have been permissible.

Applying this test, the Reitz Court found that the first prong presented a purely legal question, and the trial court determines as a matter of law what the law was and whether it was clearly established at the time of the violation. In Reitz, the district court determined that the prosecutors did not act in violation of any clearly established statutory or constitutional law and thus dismissed the claim on the grounds of qualified immunity, which the appellate court found erroneous.

The Third Circuit continued the analysis, 125 F. 3d at 147, writing:

> Although no statute or constitutional provision explicitly requires that the District Attorney's Office comply with a court order directing the return of improperly seized property within a reasonable amount of time, **it is incomprehensible that a prosecutor faced with such an order would not know that he should comply timely and that a failure to do so would undermine the authority of the court. Not only does the prosecutor have the obligation to duly comply with a judicial order, but there is the duty to avoid violating the rights of others.**

The same rationale applies to Chief Wesley, the

Chief of Police for the City of Denham Springs. The Reitz Court concluded that the assistant district attorneys should have known that their prolonged procrastination in complying with the court order would result in a violation of the plaintiffs' legally established rights.

Turning to the second prong, the Court questioned whether the prosecutors, having received the order directing the return of property to the plaintiffs, acted reasonably in failing to comply. In other words, did they act without unreasonable delay or if they did delay, did they do so justifiably. This second part of the qualified immunity test "requires application of the law to the particular conduct at issue, an inquiry which may require factual determinations if the nature of the conduct is disputed" according to Karnes, 62 F.3d at 492.

In the Reitz matter, the prosecutors asserted that they acted as quickly as possible to return the property to the rightful owners and that the delay was caused by disputes among individual members of the Reitz family regarding the ownership of the property. The plaintiffs concede that they initially disagreed over the ownership of certain items but asserted that they quickly stipulated to the ownership of several items of improperly-seized property and the District Attorney's Office still did not return the property to them until almost a year after the entry of the court order. The plaintiffs further allege that during this delay certain items of property suffered a diminution in value while other items were destroyed due to mismanagement by the defendants. This presented a dispute of material facts to the Court concerning the reasonableness of the prosecutors' conduct and therefore, the Court held, 125 F. 3d at 147:

> They [the prosecutors] are not entitled to qualified immunity as a matter of law. Thus, we must vacate the grant of summary judgment on the qualified

immunity issue in favor of Rubenstein, Moore, and Gambardella and remand the matter to the district court for further proceedings on the § 1983 claim consistent with this opinion.

In this case, after being order to return the seized items, Chief Wesley contended they were contraband and refused to return them to Mr. Perkins. No arrangements could be made with Chief Wesley to return the items. Eventually, Mr. Perkins had to send his attorney to recover the items, which were then defiantly placed in the middle of the lobby floor at the police station. No one would help move the items and the attorney, who was pregnant, could do no lifting. Eventually, Mr. Ellis Chavers, the City Treasurer, was called by counsel and came over and loaded the bottles into counsel's vehicle.

Chief Wesley acted unreasonably. He had no basis in law to declare the items contraband. This Court should apply the rationale of the Reitz case to this action and reverse the granting of qualified immunity to Chief Wesley.

CONCLUSION

For the reasons set forth herein, the foregoing Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

A. Opinion of the court of appeal

B. Order of the trial court

C. Order of the trial court for oral argument

U.S. COURT OF APPEALS
FILED
MAR 26 2002
CHARLES R. FULBRUGE III
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-31008

ADRIENNE COBB; ET AL;

ADRIENNE COBB; EDDIE OLIVER; TOMMY PERKINS NATHALAN PERKINS,

Plaintiffs-Appellants,

versus

ROBERT ROSHTO; RAYMOND HOLLOWAY; TERRY E. PITRE; MURPHY J. PAINTER; SAN GARAFOLA; AIMEE, Agent; JEFF WESLEY; SCOTT JONES; CITY OF DENHAM SPRINGS,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
Civil Docket #98-CV-622-C

Before JONES, WIENER, and PARKER, Circuit Judges.

EDITH H. JONES, Circuit Judge:*

The court has carefully considered this appeal in light of the briefs, oral argument and pertinent portions of the record. Having done so, we conclude that it is

unnecessary to recite the history of the case, as the parties are well familiar with it, and that the issues raised by appellants should be resolved as follows.

1. We affirm the implicit grant of summary judgment on § 1985 conspiracy claims raised by Tommy Perkins and Nathalan Perkins.' This court is empowered to sustain a summary judgment- on any ground asserted in the record below and sustained by the evidence. Lady v. Neal Glaser Marine, Inc., 228 F.3d 598, 601 (5th Cir. 2000). . Appellants point to no summary judgment evidence, other than their self-serving assertions in affidavits, that supports an inference of invidious motivation, i.e. a motivation by the Denham Springs defendants (the City, Jeff Wesley and Scott Jones) to deprive Tommy and Nathalan Perkins of equal protection of the laws. For lack of proof of this element of a § 1985 claim, summary judgment is proper. Hilliard v. Ferguson, 30 F.3d 649, 652-53 (5th Cir. 1994)

2. We affirm the grant of summary judgment on Tommy Perkins's § 1983 claims against the Denham Springs defendants. With regard to his claims arising from a local administrative proceeding, the district court correctly held that, as there was never a hearing (and the proceeding was dismissed by state court order), there could be no constitutional deprivations

[1]The appellees do not cross-appeal the court's July 22, 2000 order that apparently preserved any § 1985 claims Adrienne Cobb might have asserted against the Denham Springs defendants.

The claims concerning the seizure of Perkins's liquor and the alleged failure to return the liquor promptly fail because of Chief Wesley's qualified immunity. The Chief had at least arguable probable cause for his actions, precluding a finding that his actions were objectively unreasonable in light of established constitutional law. Anderson v. Creighton, 483 U.S. 635, 640 (1987)

3. We affirm the grant of summary judgment on Nathalan Perkins' § 1983 claims for the incidents other

than the Fourth Amendment claims arising out of her arrest and the search of her home. The district court's dismissal thus includes Nathalan's claims for Fifth and Sixth Amendment violations in connection with her arrest and for lost wages while Tommy Perkins's lounge was shut down. There is no evidence to sustain the former alleged constitutional violations, and there is no constitutional claim for lost wages under these circumstances.

4. We reverse and remand the grant of judgment to Robert Roshto on grounds of prescription. The state court proceedings do not support the district court's finding that the state case against Roshto was dismissed on an exception of improper cumulation. Instead, the amended petition in state court interrupted prescription against Roshto.

5. We reverse and remand the district court's dismissal of § 1988 claims brought by appellants, solely to the
extent that if appellants prevail on any of their claims, they may recover attorneys' fees and cost under § 1988.

6. We affirm the district court's discretionary decision to remand appellants' state law claims to the state court. Under the federal statute, 28 U.S.C. § 1367(c)(2), the court may decline to exercise supplemental jurisdiction over state law claims if they "substantially predominate" over the federal claims. Bass v. Parkwood Hospital, 180 F.3d 234 (5th Cir. 1999). Taking into account our reversal of summary judgment for Roshto, the dozen or more state law nevertheless continue to "substantially predominate" in number, variety, and complexity. The district court did not abuse his discretion.

7. We affirm the dismissal of Eddie Oliver's claims other than any claim pending against Robert Roshto.

AFFIRMED in part, **REVERSED** in part and

REMANDED.

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*Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

FILED

U.S. DIST. COURT

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By DEPUTY CLERK

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

ADRIENNE COBB, et al	CIVIL ACTION
VERSUS	NUMBER 98-622-C-M2
ROBERT ROSHTO, et al	JUDGE PETER BEER

ORDER

This matter came for hearing Wednesday, June 21, 2000,on two separate motions for summary judgment filed by the defendants in this action. After consideration of the motions, the oppositions thereto, the evidence submitted, and the applicable law, the Court rules as follows:

I. ROBERT ROSHTO

Robert Roshto seeks summary judgment on the basis that the claims against him have prescribed and alternatively, that he is entitled to qualified immunity. Plaintiffs do not deny that the claims against Roshto have prescribed on their face, but instead contend that prescription was interrupted by the filing

of a lawsuit in state court.

Although 42 U.S.C. § 1983 contains no statute of limitations, the analogous state law statute of limitations for personal injuries and the closely related state laws governing the tolling of the state are to be applied in such cases. Wilson v. Garcia 471 U.S. 261 (1985). In Louisiana, the prescriptive period is one year. La. Civ. Code art. 3492. It is undisputed that this suit filed in federal court on July 20, 2998 has prescribed on its face. [5]

Plaintiffs contend that prescription was interrupted, in accordance with Louisiana Civil Code article 3462, by the filing of a second amended petition in a state court lawsuit entitled Cobb v. Commissioner, Dept. of Public Safety, et al (CA No. 77,310). The original petition was termed a "Writ of Mandamus for Summary Proceeding on Issuance of Alcoholic Beverage Permit." The plaintiff is Adrienne Cobb and the defendants are the State of Louisiana and the Denham Springs Alcohol Beverage Control Board. The suit sought review of the denial of a liquor license and damages resulting therefrom.[6]

In the second amended petition, which is almost identical to the complaint filed in this case, Adrienne Cobb added Tommy Perkins, Eddie Oliver and Nathalan Perkins as plaintiffs. Cobb also named various members of the Louisiana Alcohol Beverage Control board, Robert Roshto, the City of Denham Springs, its Chief of Police, and various police officers as defendants claiming numerous civil rights violations, conspiracy, malicious prosecution, and abuse of process. However, according to the evidence submitted, the amended petition was dismissed on an exception of improper cumulation.

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[5]At the latest, the prescriptive period began to run as to the claims against Roshto when the Supreme Court denied writs in Eddie Oliver v. ABC, (CA No. 73,001) on May 31, 1996.

[6]Although Oliver v. ABC was consolidated with Cobb v. ABC at one point, that consolidation order was subsequently vacated.

The comments to La. Civ. Code art. 3462 explain that "[t]he filing of suit in a competent jurisdiction and venue interrupts any kind of prescription as to the causes of action therein sued upon, provided that the plaintiff is a proper party plaintiff and the defendant is a proper party defendant." La. Civ. Code art. 3462, Revision Comments(b). Moreover, case law suggests that the prescriptive period is only interrupted as to the causes of action filed in the earlier suit. See Ford v. Stone, 599 F. Supp. 693, 695-96 (M.D. La. 1984), aff'd 774 F.2d 1158 (5th Cir. 1985)(holding that plaintiff's state court petition failed to raise federal claims in a manner sufficient to interrupt prescription). See Louviere v. Shell, 440 So.2d 93, 96 (La. 1983). (holding that suit by a second party which states a different cause of action than the suit by the first party, does not interrupt prescription, although each cause of action is based on common facts). Thus, prescription is interrupted only as to the defendants named in the state court suit and as to the causes of action asserted therein.

Here, the amended petition was disallowed. The state district court found that adding new plaintiffs and new defendants under various theories of law to an appeal of the denial of a permit amounted to improper cumulation. The First Circuit upheld the trial court's ruling, stating that the proper course of action is to allow plaintiff to amend her petition and delete one of the actions, or for the trial court to sever the claims. Although the record is not clear as to the subsequent action in the state court proceeding, it is evident that the parties and claims asserted in the second amended petition were not properly before the state court.

The party claiming interruption of prescription bears the burden of proving that interruption occurred. Spott v. Otis Elevator Co., 601 So.2d 1355 (La. 1992). Plaintiffs have not come forth with evidence that Robert Roshto was a defendant in that state court action so as to interrupt prescription. Accordingly, all claims against Robert Roshto have prescribed and are dismissed with prejudice.

II. CITY OF DENHAM SPRINGS, JEFF WESLEY, AND SCOTT JONES

Plaintiffs have also fired Section 1983 buckshot at the Denham Springs Chief of Police, a Denham Springs police officer, and the City of Denham Springs (the Denham Springs defendants) claiming numerous civil rights violations arising out of plaintiffs' attempts to renew a liquor license. The Denham Springs defendants seek summary judgment on all claims except for two which they acknowledge involve issues of fact not ripe for summary judgment.

Section 1983 constitutional deprivations are serious business. They have no whimsical or clever side. They address the most basic of our constitutional protections and are entitled to be taken in a deadly serious vein. Because of this, the allegations that plaintiff stands ready to prove must also be considered serious business. For a plaintiff (or his counsel) to see Section 1983 as a sort of federal grab bag whereby one makes his way onto the field of battle with the hope of visiting a sort of trip and fall victory over his opponent is inappropriate. Accordingly, the Court, after consideration of the arguments of counsel, the evidence submitted on both sides and the applicable law, rules as follows on the claims asserted by each plaintiff.

A. Tommy Perkins

The following facts are undisputed. Perkins is the owner of the property where the lounge is located and also the owner of the Perkins Motel which is adjacent to the lounge. In April 1996, state ABC officer, Mike Aimee, conducted a search of Adrienne Cobb's business. He also searched the Perkins Motel, including Tommy Perkins' office, and found what is considered to be a large stash of various alcohol containers. Because Cobb's business only had a beer permit, Aimee contacted the Denham Springs police chief, John Wesley, who seized the liquor and charged Perkins with violations of the Louisiana alcohol Beverage Control law. The seizure was subsequently founded by the state court to have been illegal and in violation of the

Fourth Amendment because the properties, although adjoining, were separate businesses. (See plaintiff's exhibit G)

After the liquor was seized, the Denham Springs ABC Board, chaired by Chief Wesley, requested Perkins to attend a meeting of the Denham Springs ABC Board to discuss his business, Perkins' Restaurant and Lounge. Although the Denham Springs ABC Board re-noticed the meeting several times, the meeting never occurred because Perkins successfully challenged in state court the authority of the Denham Springs ABC Board.

The illegal seizure and the subsequent administrative process is the basis of Perkins' Section 1983 claims against the Denham Sprigs defendants. The state agent who conducted the search, Mike Aimee, is not a defendant. However, Perkins contends that Chief Wesley violated his Fourth Amendment right to be free from illegal search and seizure; his Fifth Amendment right against self incrimination; his Sixth Amendment right to "notice of nature and cause of accusations against him" and "right to be prosecuted for any alleged criminal act in a court of proper jurisdiction"; his Fourteenth Amendment rights to due process, equal protection, and to be free from malicious prosecution.

All allegations by Tommy Perkins against the City of Denham Sprigs, Chief Wesley, and Scott Jones arising out of the administrative proceedings instituted by the City of Denham Springs are dismissed as a matter of law because Perkins has failed to come forth with evidence to suggest a constitutional deprivation. It is undisputed that there was never a hearing on this matter by the Denham Springs ABC and as such, there could not have been any constitutional deprivations resulting therefrom. Accordingly, those claims are dismissed and the Court turns to the only remaining viable claim by Perkins arising under the Fourth Amendment illegal search and seizure to which defendants lead qualified immunity.

QUALIFIED IMMUNITY

Qualified immunity protects officials in the course of performance of their discretionary duties unless their conduct violates a "clearly established (federal) statutory or constitutional right [ ] of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Evans v. Ball, 168 F.3d 856 (5th Cir. 1999); Sorenson v. Ferrie, 134 F.3d 325 (5th Cir. 1998). To assess whether defendants are entitled to immunity, we must first determine whether a plaintiff has alleged the violation of a clearly established constitutional right. See Siegert v. Gilley, 500 U.S. 226, 231 (1991). If we find a right to be clearly established, we then must examine the objective legal reasonableness of the official's conduct under the circumstances, "in light of clearly established law and the information the [] officers possessed." Anderson v. Creighton, 483 U.S. 635, 640 (1987). The application of the "objectively reasonable" standard is a question of law for the Court unless there are "underlying historical facts in dispute that are material to the resolution of the question whether the defendants acted in an objectively reasonable manner." Mangieri v. Clifton, 29 F.3d 1012 (5th Cir. 1994).

The facts surrounding the seizure of the liquor are not in dispute and the Court finds that plaintiff has stated a violation of a clearly established constitutional right - the right to be free from illegal search and seizure. Plaintiff contends that there was no reasonable basis for the officer or Chief Wesley to assume that the alcohol was contraband because the licensed premises was in another separate building; Chief Wesley contends that his conduct was reasonable because Perkins "was not licensed to have hard liquor on his premises [which] was clearly a violation of law." After a review of the summary judgment evidence, the Court finds that as a matter of law, Chief Wesley's actions were objectively reasonable in light of the circumstances. The bar/lounge and the Perkins Motel were situated on the same property owned by Tommy Perkins. Tommy Perkins did not have a license to sell hard liquor. Large amounts of alcohol were found. Although the state court ultimately suppressed the seized

alcohol, it cannot be said that the seizure of the alcohol was objectively unreasonable. Qualified immunity protects an official whose conduct was objectively reasonable, even if the conduc infringed upon the plaintiff's constitutional rights. See Anderson, 4893 U.S. at 641. Accordingly, the Court finds that Chief Wesley is entitled to qualified immunity in this instance.

B. Adrienne Cobb

The Denham Springs defendants have acknowledged that issues of fact regarding the Fourth Amendment claims asserted by Adrienne Cobb and Nathalan Perkins preclude summary judgment at this time. However, the Denham Springs defendants contend that summary judgment is appropriate on all other claims asserted by these plaintiffs.

Adrienne Cobb claims that Officer Scott Jones, Chief Wesley and the City of Denham Springs participated in a conspiracy to close her business in violation of 42 U.S.C. § 1985(3). She contends that the search of her home, her arrest, and the delay in issuing her alcohol permit was part of the conspiracy and resulted in violations of her civil rights. She also claims Fourteenth Amendment violations of due process, equal protection, and freedom from malicious prosecution. Because there appear to be factual issues to be resolved concerning these claims, the Court denies summary judgment as to all claims raised by Adrienne Cobb at this time.

C. Nathalan Perkins

The only viable claims by Nathalan Perkins are those arising out of her arrest and the search of her home. All other claims by this plaintiff relating to the businesses located on Tommy Perkins' property are insupportable and are hereby dismissed with prejudice.

D. Eddie Oliver

The Denham Springs defendants seek summary judgment on the claims by Eddie Oliver contending that Oliver admitted

he is not pursuing any claims against the City of Denham Springs, Chief Wesley or Scott Jones. Without any apparent opposition, the Court grants summary judgment and dismisses the claims of Eddie Oliver against the Denham Springs defendants.

For these reasons, the Motion for Summary Judgment filed by Robert Roshto is GRANTED. The Motion for Summary Judgment filed by the Denham Springs defendants is GRANTED IN PART and DENIED IN PART.

New Orleans, Louisiana, this _5th day of July, 2000.

s/Peter Beer
Peter Beer
United States District Judge

Minute Entry
Beer, J.
June 14, 2000

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

ADRIENNE COBB, et al	*	CIVIL ACTION
VERSUS	*	NUMBER 98-622-C-M2
ROBERT ROSHTO, et al	*	JUDGE PETER BEER

The Motion for Summary Judgment filed by Robert Roshto and the Motion for Summary Judgment filed by the City of Denham Springs, Jeff Wesley and Scott Jones are set for hearing on **June 21, 2000 at 10:30 a.m.** in the United States District Court, 777 Florida Street, Baton Rouge, Louisiana. Oral argument is requested. All parties are invited to attend and participate as they deem appropriate.

S/ P.B.

Supreme Court, U.S.
FILED
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No. 01-1870

In The
SUPREME COURT OF THE UNITED STATES

ADRIENNE COBB, EDDIE OLIVER, TOMMY PERKINS, and NATHALAN PERKINS, *Petitioners*,

v.

ROBERT ROSHTO, RAYMOND E. HOLLOWAY, TERRY E. PITRE, MURPHY J. PAINER, SAM GARAFOLA, UNKNOWN AIMEE, Agent, JEFF WESLEY, SCOTT JONES, and THE CITY OF DENHAM SPRINGS, LOUISIANA, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief for Respondents in Opposition to Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit erred when it found that the District Court properly exercised its discretion in declining to maintain supplemental jurisdiction over any state law claims, where the state law claims predominate over the remaining federal claims and the same state claims are pending in state court.

2. Whether the Fifth Circuit erred when it found that the District Court properly decided the motion for partial summary judgment filed by the City of Denham Springs, Jeff Wesley and Scott Jones, by dismissing the following claims on the ground that no genuine issue of material fact exists and defendants are entitled to judgment as a matter of law:
   - Dismissing all federal claims by Tommy Perkins against defendants, where Perkins was never prosecuted or otherwise forced to defend the liquor law violations charged by the Denham Springs ABC Board; where Perkins failed to come forth with evidence of a constitutional deprivation arising out of the charges; and where Chief Jeff Wesley's action in seizing almost 200 bottles of liquor from Perkins' unlicensed premises was objectively reasonable;
   - Dismissing the federal claims of Nathalan Perkins against defendants raised in defendants' motion for partial summary judgment, where Perkins failed to prove a violation of her Fifth or Sixth Amendment rights following her arrest on drug offenses.

PARTIES TO THE PROCEEDING

The following individuals are parties to the proceeding in the court below:

Adrienne Cobbs, Tommy Perkins, Nathalan Perkins, and Kathy Scott, Latasha Scott, and Jame Oliver, Jr. (substituted as parties plaintiff for Eddie Oliver); *Plaintiffs-Petitioners;*

Robert Roshto, Jeff Wesley, Scott Jones, and The City of Denham Springs, Louisiana; *Defendants-Respondents.*

CORPORATE DISCLOSURE STATEMENT

No party hereto is a nongovernmental corporation.

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The opinion of the Fifth Circuit Court of Appeal was not designated for publication. The Order of the United States District Court for the Middle District of Louisiana deciding the motions for summary judgment is not reported.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The text of the constitutional provisions and statutes cited below appear in the appendix. Supreme Court Rule 24.1(f).

Petitioners' claims for violation of their constitutional rights and for conspiracy to violate their constitutional rights are brought pursuant to 42 U.S.C. §1983 and §1985.

The claims of Tommy Perkins which were dismissed on the respondents' motion for partial summary judgment were for alleged violations of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Louisiana Civil Code article 2315. Nathalan Perkins' claims which were dismissed on respondents' motion for partial summary judgment were for alleged violations of the Fifth and Sixth Amendments to the United States Constitution, and La. Civ. Code art. 2315.

Further, although the petitioners invoked the District Court's jurisdiction over the state law claims pursuant to 28 U.S.C. §1367, the court declined to exercise jurisdiction over those claims.

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.2, respondents state that they perceiye several misstatements of fact in the petition for writ of certiorari. For the sake of brevity and clarity, respondents discharge their obligation to the Court to point out the misstatements by presenting their own statement of facts in the stead of petitioners' presentation of the facts. Supreme Court Rule 24.2.

A. Nature of the Case.

Plaintiffs-petitioners characterize this case as a suit arising out of efforts by plaintiffs to renew a liquor license for the business located at 436A Summer Street in Denham Springs, Louisiana ("the premises"), and the "unnecessary court battles which ensued" to obtain and maintain a liquor license for the premises. Specifically, plaintiffs claim that efforts were made to deprive them of a liquor license for the business, and that the illegal searches and false drug charges were made against Adrienne Cobbs and Nathalan Perkins in furtherance of that purpose. Defendants deny these allegations.

B. Course and Disposition of Proceedings Below.

Plaintiffs filed this suit on July 9, 1998, alleging violations of various constitutional rights, and state law tort claims.[1] Jurisdiction

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[1] These claims were first made on March 14, 1997, pursuant to a "Second Amended Petition for Damages from a Decision of the Commissioner of the Office of Alcohol Beverage Control Denying Permit for Retail Class AR Beer and Liquor Permit", to the suit

was based on 42 U.S.C. §1343, for alleged violations of civil rights, and under 28 U.S.C. §1367. Plaintiffs named as defendants various officials and employees of the Louisiana Office of Alcohol Beverage Control ("the state defendants"),[2] and Jeff Wesley, Scott Jones and the City of Denham Springs ("the Denham Springs defendants" or "defendants"). All state defendants were dismissed from the case except for Robert Roshto.

On March 24, 2000, the Denham Springs defendants filed a motion for partial summary judgment seeking a dismissal of all claims filed by Tommy Perkins, Eddie Oliver, Adrienne Cobbs and Nathalan Perkins, except for Adrienne Cobbs' and Nathalan Perkins' §1983 claims for alleged violations of their Fourth Amendments rights. Specifically, defendants moved for partial summary judgment on all other remaining claims on the following grounds: (1) Tommy Perkins cannot prove his federal §1983 claims for violations of his rights, or his state law claims; (2) Adrienne Cobbs cannot prove her federal §1983 claims for violation of her constitutional rights, or her state law claims; (3) Nathalan Perkins cannot prove her federal §1983 claims for violation of her

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entitled *Adrienne Cobbs d/b/a AC's Restaurant and Lounge, et al v. Commissioner, Department of Public Safety & Corrections, et al*, No. 77,310, 21st Judicial District Court, Parish of Livingston, State of Louisiana. On July 23, 1997, the state court granted an exception of improper cumulation filed by the Denham Springs defendants. Complaint, para. 2.

[2]These individuals were Raymond E. Holloway, Terry E. Pitre Murphy J. Painter, Sam Garafola, Robert Roshto and "Agent Aimee".

constitutional rights; and (4) Plaintiffs cannot prove a conspiracy in violation of 42 U.S.C. §1985.

At oral argument on June 21, 2000, the Court heard defendants' motion for partial summary judgment, and Robert Roshto's motion for summary judgment. During the hearing, the Court declined to maintain supplemental jurisdiction over any state law claims and remanded those claims. Judgment was entered accordingly on June 22, 2000.

On July 5, 2000, after additional briefing by plaintiffs on the issue of Section 1983 liability of the City of Denham Springs, the Court granted the motion for summary judgment filed by Robert Roshto, and granted in part and denied in part defendants' motion for partial summary judgment, essentially granting the motion on all claims presented for summary judgment except Adrienne Cobbs' claims. Judge Peter Beer's written order made it clear that Section 1983 is serious business, and it is not appropriate to see it as a "federal grab bag whereby one makes his way onto the field of battle with the hope of visiting a sort of trip and fall victory over his opponent."

The Fifth Circuit Court of Appeal upheld the District Court's ruling as to the Denham Springs defendants, namely (1) affirming the grant of summary judgment on the §1985 conspiracy claims raised by Tommy Perkins and Nathalan Perkins; (2) affirming the grant of summary judgment on Tommy Perkins' §1983 claims against the Denham Springs defendants; (3) affirming the grant of summary judgment on Nathalan Perkins' §1983 claims for the incidents other than the Fourth Amendment claims arising out of her arrest and the search of her home; (4) affirming the District

Court's discretionary decision to remand the petitioners' state law claims to the state court; and (5) affirming the dismissal of Eddie Oliver's claims against the Denham Springs defendants.

C. Statement of Facts.

Below is a chronology of key events that bear on the issues that would be before the Court as to the Denham Springs defendants if certiorari were to be granted:

1996

April 1, 1996	Bay Lane, Inc. leases 436A Summer Street to Adrienne Cobbs.
April 29, 1996	Louisiana Office of Alcohol Beverage Control ("State ABC") Officer Mike Aimee finds alcohol while conducting an inspection of 436A Summer Street in connection with Adrienne Cobbs' liquor license applications. The Denham Springs Police Department seizes 191 bottles of alcohol from Tommy Perkins' office at 436 Summer Street and charges Tommy Perkins with three violations of the Louisiana Alcohol Beverage Control Law, La.R.S. 26:1, *et seq.*

April 29, 1996	Denham Springs Alcohol Beverage Control Board ("Denham Springs ABC") issues notice to Tommy Perkins to appear at a special meeting.
May 1, 1996	Denham Springs ABC Board grants extension and continuance to Tommy Perkins.
May 7, 1996	Denham Springs ABC grants Tommy Perkins another continuance.
May 20, 1996	Ms. Cobbs completes the applications for liquor licenses for 436A Summer Street by having submitted completed paperwork to both Denham Springs ABC and State ABC.
May 21, 1996	Denham Springs Police Department searches Adrienne Cobbs' home pursuant to search warrant, seizes illegal drugs, and charges Adrienne Cobbs with resisting arrest and three violations of the Uniform Controlled Dangerous Substances Law, La. R.S. 40:961, *et. seq.*
May 28, 1996	Denham Springs ABC Board grants another continuance to Tommy Perkins.

June 21, 1996	State court issues TRO against Denham Springs ABC Board prohibiting it from conducting any proceedings relating to the charges against Tommy Perkins in *Tommy Perkins v. City of Denham Springs Alcohol Beverage Control Board, et al*, No. 76,766, 21st Judicial District Court.
July 11, 1996	Tommy Perkins files a rule to show cause why the TRO should not be converted to a preliminary injunction. Perkins subsequently amends injunction pleadings to plead lack of subject matter jurisdiction of the Denham Springs ABC Board.
August 13, 1996	Denham Springs ABC Board does not act on the Adrienne Cobbs' and Tommy Perkins' matters on the agenda because of the pending injunction and challenge to the validity of the board.
August 1996	State court grants Tommy Perkins' exception and finds the Denham Springs ABC was not authorized by law. The Denham Springs ABC was disbanded and all proceedings instituted by the Denham Springs ABC against Mr. Perkins were discontinued.

August 15, 1996	State ABC denies Cobbs' liquor license application.
August 21, 1996	Adrienne Cobbs files mandamus action against the State ABC and City of Denham Springs seeking action on her liquor license application, entitled *Adrienne Cobbs v. Dept. of Public Safety*, No. 77,310, 21st Judicial District Court.
September 23, 1996	Denham Springs Board of Aldermen approves issuance of Class AR liquor license to Adrienne Cobbs.
December 5, 1996	State ABC issues liquor license to Adrienne Cobbs.

1997

January 7, 1997	City Court grants Tommy Perkins' Motion to Suppress, and orders the return ofthe liquor seized from Tommy Perkins' office at 436 Summer Street in *City of Denham Springs/State of Louisiana v. Tommy Perkins*, No. 149,319 Denham Springs City Court, Ward II.

February 27, 1997	Denham Springs Police Department searches Nathalan Perkins' home pursuant to a search warrant, seizes illegal drugs, and charges Ms. Perkins with two violations of the Uniform Controlled Dangerous Substances Law, La.R.S. 40:961, *et seq.*
March 14, 1997	Plaintiffs file second amended petition in *Adrienne Cobbs vs. Department of Public Safety, et al,* 77,310, 21st Judicial District Court, adding the Denham Springs defendants and new claims.
March 20, 1997	Denham Springs releases seized liquor to Tommy Perkins through attorney Donna Grodner.

The plaintiffs' complaint alleges two categories of claims: (1) plaintiffs' "liquor license" claims against the Denham Springs defendants and the state ABC (through attorney Robert Roshto), and (2) the Fourth Amendment search and seizure claims against the Denham Springs defendants. The District Court denied summary judgment on Cobbs' claims, but granted it as to Tommy Perkins', Nathalan Perkins', and Oliver's claims arising out of plaintiffs' efforts to obtain liquor licenses for the business. The Fifth Circuit affirmed.

Plaintiffs' Fourth Amendment claims arise out of three

separate and distinct events. The first incident was on April 29, 1996, when 191 bottles of liquor were seized from Tommy Perkins' office located in 436 Summer Street, because the premises did not have a license for high alcohol content beverages. Charges were brought against Mr. Perkins for violations of the Alcohol Beverage Control Law. Defendants' motion for summary judgment on all claims asserted by Tommy Perkins arising out of this incident was granted. The Fifth Circuit affirmed.

The other two incidents involve searches of the homes of Adrienne Cobbs and Nathalan Perkins pursuant to search warrants, and their arrests on drug charges in May 1996 and February 1997, respectively. Defendants did not move for summary judgment on the Fourth Amendment claims arising out of these events. However, defendants moved for summary judgment on the purported claims by Cobbs and Nathalan Perkins for violation of the Fifth, Sixth and Fourteenth Amendments arising out of these incidents. Nathalan Perkins' claims were dismissed, and the Fifth Circuit affirmed.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Petitioners present no compelling reasons to review this case on a writ of certiorari. Sup. Ct. Rule 10. Plaintiffs assert erroneous factual findings and/or misapplication of rules of law, circumstances under which a petition for writ of certiorari is rarely granted. Sup. Ct. Rule 10. The nature of these alleged errors, which defendants deny, is shown by the questions presented for review by petitioners (Petition, p. i), which can be interpreted as follows:

I. The Court of Appeal misapplied 28 U.S.C. §1367 when it found that the District Court properly used its discretion to decline supplemental jurisdiction over the state claims;

II. The Court of Appeal made an erroneous factual finding when it found that plaintiffs had insufficient evidence to prove their conspiracy claims under 42 U.S.C. §1985;

III. The Court of Appeal made an erroneous factual finding that there was never a hearing by the Denham Springs ABC involving Tommy Perkins, and all proceedings were dismissed by state court order;

IV. The Court of Appeal misapplied the law of qualified immunity in favor of Jeff Wesley;

Petitioners do not claim a conflict with a decision of another court of appeal; do not present an important federal question that should be decided by this Court; and do not show any departure from the accepted and usual course of judicial proceedings in the lower courts. Sup. Ct. Rule 10(a)-(c). The lower courts' factual findings and application of established law were correct and properly supported by the record. Because petitioners have presented no compelling reason and no reason of the character warranting review of a matter, this Court should deny the petition for writ of certiorari.

ARGUMENT

A. Summary of Argument.

The Fifth Circuit correctly found no abuse of discretion in the remand of the state claims and correctly affirmed the summary judgment dismissing the federal claims brought by Tommy Perkins and Nathalan Perkins,[3] for the reasons discussed below.

1. State Claims

The District Court properly exercised its discretion in refusing to decide the plaintiffs' claims arising under Louisiana law, on the grounds that (1) under 28 U.S.C. 1367(c)(2), the state law claims predominate over the federal claims, and (2) under Section 1367(c)(4), the District Court's decision to decline jurisdiction is justified, since plaintiffs had asserted the identical state claims in a pending state court action.

2. Tommy Perkins

On April 29, 1996, state ABC Officer Mike Aimee called the Denham Springs police department while inspecting 436A Summer Street (the premises for which Cobbs was seeking a license), and requested that 191 bottles of liquor on the premises be seized because the premises was not licensed for high alcohol content beverages. The liquor was in Tommy Perkins' office located in a connecting building behind 436A Summer Street and believed to have the address 436B Summer Street. There was no liquor license for 436A and only a beer permit covering 436B. The Denham Springs police department seized the liquor and Mr.

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[3]The dismissal of Eddie Oliver's claims are not addressed herein, as petitioners have not presented the dismissal of his claims as an issue for review.

Perkins was issued a summons to appear in the Denham Springs City Court for violations of the Alcohol Beverage Control Law. The court found that officer Aimee's search was unlawful, and suppressed the seized liquor. Chief Jeff Wesley thereafter sought clarification of the judge's order to return the seized alcohol to Mr. Perkins because they would have to cite him again for possessing the alcohol on an unlicensed premises. Denham Springs thereafter released the liquor to Mr. Perkins. Mr. Perkins cannot prove any violation of the Fourth, Fifth, Sixth, or Fourteenth Amendments arising out of this incident. Furthermore, Chief Jeff Wesley's actions were objectively reasonable and in good faith, and he is entitled to qualified immunity.

As to the requests by the Denham Springs ABC for Mr. Perkins to appear before the board to discuss the citations under the Alcohol Beverage Control Law, Mr. Perkins was granted several continuances and obtained a court order to dissolve the board before a hearing was ever held. Therefore, the lower courts correctly found that no constitutional deprivation could have occurred.

3. Nathalan Perkins

Nathalan Perkins, who is Tommy Perkins' daughter, never operated or had any ownership interest in any of the businesses at 436A Summer Street. Ms. Perkins was "employed" as a part-time cook in Oliver's Restaurant and Lounge and AC's Restaurant and Lounge. Ms. Perkins seeks lost wages during the period of time the businesses did not have a liquor license. This claim was properly dismissed on the ground that there is no constitutional claim for lost wages under the facts of this case.

In February 1997, the Denham Springs police department executed a search warrant for Ms. Perkins' home. Illegal drugs and drug paraphernalia were found in the search, and Ms. Perkins was arrested on drug offenses. Ms. Perkins asserts claims against the Denham Springs defendants for violations of her Fourth, Fifth and Sixth Amendment rights. The Fifth and Sixth Amendment claims were properly dismissed because Ms. Perkins has no proof that such violations occurred.

4. Conspiracy Claims

Plaintiffs did not prove a conspiracy against Tommy Perkins or Nathalan Perkins in violation of 42 U.S.C. §1985(3), because there is no evidence of a common plan or design among two or more of the defendants to violate the equal protection rights of Tommy Perkins or Nathalan Perkins, and no evidence of any racial or other class-based discriminatory animus by defendants.

B. The Fifth Circuit Properly Found that the District Court did not Abuse its Discretion in Declining to Hear the State law Claims.

1. Scope of Discretion

The District Court in its June 22, 2000 order, declined to maintain supplemental jurisdiction over any state law claims in this matter. 28 U.S.C. §1367(c) provides the court with discretion to refuse to hear the supplemental claims. Bass v. Parkwood Hospital, 180 F.3d 234 (5th Cir. 1999). In making this decision, the Court must consider both the statutory provisions of 28 U.S.C. §1367(c) and the balance of the relevant factors of judicial economy,

convenience, fairness and comity. Id. at 227 (citing Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350-51 (1988); United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966)).

This Court has made it clear that pendent jurisdiction "is a doctrine of discretion, not of plaintiff's right," and that district courts can decline to exercise jurisdiction over pendent claims for a number of valid reasons. City of Chicago v. International College of Surgeons, 522 U.S. 156, 118 S.Ct. 523, 533, 139 L.Ed.2d 525 (1997)(citing Gibbs, 383 U.S., at 726-727, 86 S.Ct., at 1139-1140). Accordingly, "district courts [should] deal with cases involving pendent claims in the manner that best serves the principles of economy, convenience, fairness, and comity which underlie the pendent jurisdiction doctrine." Id., 118 S.Ct. at 533. The supplemental jurisdiction statute [28 U.S.C. §1367] codifies these principles. Id.

28 U.S.C. §1367 confirms the discretionary nature of supplemental jurisdiction by enumerating the circumstances in which district courts can refuse its exercise:

> "(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--
>
> > "(1) the claim raises a novel or complex issue of State law,
> > "(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

> "(3) the district court has dismissed all claims over which it has original jurisdiction, or
> "(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction."

City of Chicago, 118 S.Ct. at 533-534 (citing 28 U.S.C. § 1367(c)).

2. The District Court's Remand of the State Claims was Proper

The allegations of plaintiffs' complaint contain approximately thirteen (13) separate claims arising under state law, including five claims of malicious prosecution, and multiple claims of abuse of process, intentional infliction of emotional distress, and the tort of "harassment."

At the hearing on the summary judgment motions, the court advised that he was not going to "invade the territory that is property patrolled by the state court system." In declining to exercise jurisdiction over the state claims, the District Court was aware of and concerned about the present state court proceedings involving the same parties. The court specifically asked plaintiffs' counsel whether the plaintiffs were going to proceed with their identical claims in the state court action. The court commented:

> But the notion that this stuff is going to get somehow or other carried over to this federal court simply because nobody wants to go ahead and

> resolve what is extant before the state court, or, even more compellingly, that they think they may not be as fairly treated or whatever, is simply not an acceptable contention as far as this court is concerned.

For these reasons, the District Court declined to exercise supplemental jurisdiction over the state claims and remanded those claims to the proceedings in state court. The Fifth Circuit found no abuse of discretion.

The lower courts' decisions were correct because the circumstances of this case fall within the court's discretion to decline supplemental jurisdiction under 28 U.S.C. Sections 1367(c)(2) and (4), and the Gibbs factors of judicial economy, convenience, and fairness to the parties. Under Section 1367(c)(2), if the claims supported by supplemental jurisdiction "substantially predominate over the claim or claims over which the District Court has original jurisdiction," the court may decline to exercise jurisdiction. The state claims in this case greatly increase the number of ultimate factual issues a jury must consider. The theories of malicious prosecution, abuse of process, intentional infliction of emotional distress, and the tort of "harassment" each contain several elements of proof, and therefore additional fact issues, for consideration by a jury as compared to the remaining federal claims.[4] Trial of the

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[4]The federal claims left to be litigated against the DenhamSprings defendants are the federal claims of Adrienne Cobbs, which include claims under the Fourth, Fifth, Sixth and Fourteenth Amendments, and a conspiracy claim under 42 U.S.C. §1985; and Nathalan Perkins' Fourth Amendment claim.

issues together would also engender confusion for a jury. The court's remand of the state claims were thus proper pursuant to 28 U.S.C. Section 1367(c)(2).

In "exceptional circumstances," a court may decline to exercise jurisdiction when "there are compelling reasons" for doing so. 28 U.S.C. § 1367(c)(4). The plaintiffs' pending state court case presents such a circumstance. Adrienne Cobbs originally filed a mandamus action on August 21, 1996, against the state ABC and Denham Springs seeking action on her liquor license application. That action was entitled "Adrienne Cobbs v. Department of Public Safety," No. 77,310, 21st Judicial District Court. On March 14, 1997, a second supplemental petition was filed, adding all the plaintiffs and defendants in the captioned case, and asserting (in over 100 paragraphs) the same claims which were subsequently brought in the District Court.

In Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992), cert denied, 506 U.S. 1087, 113 S.Ct. 1067, 122 L. Ed. 2d 371 (1993), the court of appeal found "compelling reasons" for declining jurisdiction of state claims when identical claims were pending in state court:

> We find such "exceptional circumstances" and "compelling reasons" here. Adjudicating state-law claims in federal court while identical claims are pending in state court would be a pointless waste of judicial resources.

Id., at 125. Given that plaintiffs had elected to seek state court redress, it would not serve the values of economy, convenience,

fairness and comity for the federal court to retain jurisdiction over the plaintiffs' state law claims. Thus, the District Court's decision to dismiss the state law claims was within the court's discretion under 28 U.S.C. §1367(c)(2) and (4), and the Fifth Circuit correctly affirmed that decision.

C. The Fifth Circuit Correctly Found That Summary Judgment was Properly Granted.

1. Tommy Perkins' Federal Claims

a. Fourth Amendment Claim

While a search pursuant to a warrant is preferred, the Supreme Court has recognized flexible, common-sense exceptions to this requirement, such as where voluntary cooperation or consent is given. See, Texas v. Brown, 460 U.S. 730, 735-736, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (and cases cited therein).

On April 29, 1996, state ABC officer Mike Aimee inspected 436A Summer Street as part of the state liquor license permitting process. 436A Summer Street had just become AC's Restaurant and Lounge and was vacant at the time. Tommy Perkins testified that he was in his office in one of the motel rooms of 436B Summer Street.

The buildings housing both businesses were at one time 436 Summer Street. When Mr. Perkins leased the "front" part of the building in the early 1990s for the restaurant and lounge business, the property was divided into 436A and 436B. There is a staircase and a shed connecting the two buildings. Mr. Perkins' office is

located down a hallway behind AC's Restaurant and Lounge.

Agent Aimee inquired about Adrienne Cobbs' license and wanted to go in Mr. Perkins' office. Mr. Perkins unlocked the door to his office and Agent Aimee found 191 bottles of liquor inside. Agent Aimee then called Chief Jeff Wesley. Chief Wesley explained what happened then:

> The phone rang. An individual identifying himself as Mike Aimee with the state ABC asked if I was familiar with Perkins Lounge. I said yes. He said, well, I think you need to come over and look at something. So I drove up. He met me in the parking lot and introduced himself. That's when we went in and went into the office area and saw a very large stash of various alcoholic containers, whiskey, rum, whatever. There were many different containers in that office.

Mr. Perkins only had a beer permit. His lounge at 436B Summer Street was not licensed for high alcohol content beverages. The liquor was seized from Mr. Perkins' office, and he was charged with three violations of the Louisiana Alcohol Beverage Control Law, La.R.S. 26:1, *et seq.*

The Fourth Amendment protects persons against unreasonable searches and seizures. Chandler v. Miller, 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997). Regardless of whether Agent Aimee's inspection of Mr. Perkins' office constitutes an unreasonable "search, the city's seizure of the liquor was objectively reasonable under the circumstances, and Chief Wesley

is entitled to qualified immunity. Qualified immunity protects officials in the course of performance of their discretionary duties unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Chief Wesley is entitled to immunity because his conduct was objectively reasonable under the circumstances. Chief Wesley testified:

> Q. As to the specific violations, where he got those, you don't know, do you?
>
> A. No, but we know, for instance, the fact that he was not licensed to have hard liquor on his premises was certainly a violation of law. We considered it - Though since that time the courts have seen fit to say otherwise, we considered those - that alcohol to be on his premises, and he was in violation because he had the alcohol on his premises.

In fact, when the court suppressed the liquor and ordered it returned, Chief Wesley asked for clarification of the order because "if we returned those beverages to his property, then we'd have to cite him or arrest him for having possession of them." Once the judge clarified his order on returning the liquor, Chief Wesley willingly released the property.

It is clear that Chief Wesley's actions were objectively reasonable under the circumstances, and he is entitled to qualified immunity. The District Court agreed, finding:

> The bar/lounge and the Perkins Motel were situated on the same property owned by Tommy Perkins. Tommy Perkins did not have a license to sell hard liquor. Large amounts of alcohol were found. Although the state court ultimately suppressed the seized alcohol, it cannot be said that the seizure of the alcohol was objectively unreasonable. Qualified immunity protects an official whose conduct was objectively reasonable, even if the conduct infringed upon the plaintiff's constitutional rights. See Anderson. 483 U.S. at 641. Accordingly, the Court finds that Chief Wesley is entitled to qualified immunity in this instance.

b. Fifth and Sixth Amendment Claims

Tommy Perkins complains defendants violated his Fifth Amendment rights against "self-incrimination" and "double jeopardy", and his Sixth Amendment rights to "notice of nature and cause of accusations against him" and "right to be prosecuted for any alleged criminal act in a court of proper jurisdiction."

After the liquor was seized from Mr. Perkins' office, the Denham Springs ABC Board,[5] chaired by Chief Jeff Wesley,

---

[5]The function of the Denham Springs ABC board was to review alcohol permit applications, hear citizen complaints, and take administrative action against licensed businesses where appropriate. The Denham Springs ABC Board made recommendations on permit applications on imposing administrative penalties to the Denham

requested Mr. Perkins to appear and respond to the charges at a board meeting on May 1, 1996. Plaintiffs try to paint a picture of improper conduct by the Denham Springs defendants, when in fact the city gave Mr. Perkins every opportunity to speak on his behalf before the ABC board considered administrative penalties against him for the April 1996 alcohol incident. At the request of Mr. Perkins, the board granted an extension and continuance of the administrative hearing. The board thereafter granted Mr. Perkins two more extensions, and issued a formal notice to appear at his request, which included the nature of the offenses, and potential administrative penalties.

When the administrative hearing on Mr. Perkins' violation of the Alcohol Beverage Control Law was finally set for June 24, 1996, Mr. Perkins obtained a TRO against the board to stop the administrative hearing. The June 24, 1996 hearing was canceled. The Denham Springs ABC board issued another notice on July 18, 1996, setting the meeting for August 13, 1996, which was met with a rule to show cause for a preliminary injunction by Mr. Perkins. Then Mr. Perkins challenged Denham Springs' authority to have an alcohol beverage control board.[6] Consequently, the ABC board tabled all ABC matters at the August 13, 1996 meeting, including the Tommy Perkins item and discussion on Adrienne Cobbs' liquor license application. Thereafter, the Court granted Mr. Perkins' rule, and the Denham Springs ABC board dissolved.

Springs Board of Aldermen.

[6]Mr. Perkins asserted that under state law required a city to have a population of at least 400,000 to have an ABC board. According to the city, there is a split in legal authority on that issue.

These events clearly show that there were no violations of Mr. Perkins' rights against self incrimination, double jeopardy, "notice of nature and cause of accusations against him," or "right to be prosecuted for any alleged criminal act in a court of proper jurisdiction." Mr. Perkins was given every opportunity to prepare his case before the Denham Springs ABC Board, which ultimately never occurred.

c. Fourteenth Amendment Claims

Mr. Perkins asserts the following Fourteenth Amendment claims: (1) right to due process of law through needless, vexatious abuse of the civil and administrative process, (2) right to equal protection of the laws through selective prosecution based on race; and (3) right to be free from malicious prosecution. Mr. Perkins articulated the factual basis of his claims under the Fourteenth Amendment as follows:

> Response to Interrogatory No. 21: Due process of law requires adequate notice and an opportunity to present a defense. Also, because Mr. Perkins is an African American his family was targeted for drug busts by Chief Wesley and Scott Jones as a way to get back or get to Mr. Perkins or run him out of business.

Mr. Perkins' 14th Amendment due process claim for alleged abuse of the "administrative process" falls because the Denham Springs ABC Board did not "prosecute" Mr. Perkins. Mr. Perkins won his challenge of the ABC Board's authority to act, and the administrative proceedings that the Denham Springs ABC

Board planned to conduct regarding the alcohol charges never occurred. It is undisputed that a hearing was never held and no administrative penalties were assessed against Mr. Perkins arising out of the alleged alcohol violations.

Mr. Perkins' "selective prosecution" and "malicious prosecution" claims likewise fail. In order to find an equal protection violation on the grounds of "selective enforcement", it must be shown that the selection was deliberately based on an unjustifiable standard such as race, religion, or other arbitrary classification. Oyler v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962). Similarly, a claim of malicious prosecution is cognizable under §1983 only if the prosecution is conducted with the intent to deprive a person of equal protection of the law. Karim-Panahi v. Los Angeles Police Department, 839 F.2d 621, 624 (9th Cir. 1988).

In the present case, there is no evidence that Mr. Perkins was singled out for prosecution, while others similarly situated who had committed the same acts were not prosecuted. See, United States v. Tibbatts, 646 F.2d 193, 195 (5th Cir. 1981). Moreover, there is no showing of arbitrary, capricious or malicious "prosecution" of the alcohol violations in Denham Springs City Court, or any evidence that the "prosecution" of Mr. Perkins was based on an unjustifiable standard such as race, religion or gender. See, U.S. v. Lichenstein, 610 F.2d 1272, 1281 (5th Cir.) cert denied, 447 U.S. 907, 100 S.Ct. 2991, 64 L.Ed.2d 856 (1980). Mr. Perkins' only "proof" is a bare allegation and suspicion of racial discrimination. Mr. Perkins admits that the city has never revoked his license for Perkins' Motel and Lounge (436B Summer Street), and has never made an effort to shut down that business.

That the city court found Agent Aimee had authority to inspect only 436A (not 436B) and that the police department was wrong in seizing the alcohol, does not turn defendants' actions into ones motivated by race discrimination. Mr. Perkins must prove that racial animus motivated Agent Aimee and the Denham Springs defendants to seize the alcohol and charge him with the alcohol violations.

Consequently, there exists no proof of an intent to deprive Mr. Perkins of equal protection of the laws, and no proof of an actual violation. The defendants must have "selected . . . a course of action at least in part 'because of' not merely 'in spite of' its adverse effects on an identifiable group". Personnel Administrator v. Feeney, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). Mr. Perkins has fallen short of his difficult burden of proving discriminatory intent or disparate treatment by the Denham Springs defendants as required to establish the constitutional tort. Accordingly, all federal claims brought by Tommy Perkins were properly dismissed.

2. Nathalan Perkins' Federal Claims

Nathalan Perkins claims that defendants violated her Fifth Amendment right against self-incrimination, and Sixth Amendment right to counsel. Ms. Perkins alleges that in February 1997, Scott Jones approached her at McDonald's and advised her that he had a warrant to search her home. The search warrant was based on a controlled buy of an illegal drug from Ms. Perkins' home. Lieutenant Scott Jones, along with other Denham Springs police officers and Livingston Parish sheriff's deputies, executed the search warrant and found illegal drugs and drug paraphernalia. Ms.

Perkins was arrested and charged with various drug offenses. Ms. Perkins alleges defendants violated her Fourth, Fifth and Sixth Amendment rights during the search and subsequent arrest.

The Fifth Amendment to the U.S. Constitution provides that a defendant cannot be "compelled in any criminal case to be a witness against himself." Consistent with this right against self-incrimination, this Court in Miranda v. Arizona, 384 U.S. 436, 478-479, 86 S.Ct. 1602, 1630, 16 L.Ed. 2d 694 (1966), ruled that suspects cannot be subjected to a custodial interrogation until they have been advised of their rights. Any incrimination statement elicited from a suspect in custody cannot be admitted at trial unless the suspect was first advised of his Miranda rights. Stansbury v. California, 511 U.S. 318, 322, 114 S.Ct. 1526, 1528-29, 128 L.Ed.2d 293 (1994). There is no evidence that defendants failed to give Ms. Perkins the Miranda warnings. Ms. Perkins admitted that she signed the "rights form" showing that she read and understood the Miranda warnings. There is no allegation that the waiver was not voluntary. Furthermore, there is no evidence that Ms. Perkins made any confession or statement regarding any charges against her. Therefore, Ms. Perkins did not prove a violation of the Fifth Amendment, and this claim was properly dismissed.

The Sixth Amendment to the U.S. Constitution sets forth an individual's right to assistance of counsel in a criminal investigation. This Sixth Amendment right does not attach until adversarial criminal proceedings are initiated. Davis v. U.S., 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed. 2d 362 (1994). A person who is subjected to custodial interrogation has the right to consult with, and be assisted by, an attorney during questioning as a procedural

safeguard to that individual's right against compulsory self-incrimination. Miranda v. Arizona 384 U.S. 436, 478-479, 86 S.Ct. 1602, 1630, 16 L. Ed. 2d 694 (1966). There being no evidence that Ms. Perkins was subjected to a custodial interrogation and invoked her right to counsel, the Sixth Amendment is not implicated, and her claim was correctly dismissed.

Additionally, Ms. Perkins seeks damages from defendants for lost wages during the period of time Mr. Oliver and Ms. Cobbs did not have a liquor license for 436A Summer Street. Ms. Perkins was a part-time cook for the business. Ms. Perkins was employed by and paid by her father, **Tommy Perkins**, to work in the restaurant and lounge. Mr. Perkins paid her $350 per month when the business was operating and "took care" of her financially while the business was not operating. Defendants have not found any authority whatsoever that would give Ms. Perkins either a claim for violation of a constitutional right, or a right or cause of action for lost wages against the Denham Springs defendants under these circumstances, assuming Ms. Perkins can prove she sustained any such damages. The Fifth Circuit properly affirmed the District Court's finding that Ms. Perkins' claims relating to the business are unsupportable.

3. The Federal Conspiracy Claims Under 42 U.S.C. §1985

To assert a claim of conspiracy under 42 U.S.C. §1985(3), a plaintiff must prove, (1) conspiracy involving two or more persons, (2) for the purpose of depriving, directly or indirectly, a person or a class of persons of the equal protection of the laws, (3) an act in

furtherance of the conspiracy which (4) causes injury to a person or property, or deprivation of any right or privilege of a citizen of the United States. Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971); Hilliard v. Ferguson, 30 F.3d 649, 652-53 (5th Cir. 1994).

Because of the dismissal of the federal claims by Mr. Perkins and Ms. Perkins, these plaintiffs cannot prove any injury "in his person or property" or a deprivation of a "right or privilege of a citizen of the United States." 42 U.S.C. §1985(3). Plaintiffs freely admit that there is no evidence that a racial or other class based discriminatory animus motivated any action taken by Chief Jeff Wesley against any plaintiff.

Further, Section 1985 does not grant a cause of action for every conspiratorial tort or for every wrong committed by a common plan or design; it grants a federal cause of action only for conspiracies to deprive "any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." Some racial or other class-based, individiously discriminatory animus is an essential element of an action under 42 U.S.C. §1985(3). Griffin v. Breckenridge, 403 U.S. at 102. Thus, "the plaintiff must show that the conspiracy was motivated by class-based animus." Hilliard v. Ferguson, 30 F.3d at 653 (citing Burns-Toole v. Byrne, 11 F.3d 1270, 1276, (5th Cir.), cert. denied, 512 U.S. 1207, 114 S.Ct. 2680, 129 L.Ed.2d 814 (1994)).

As discussed with Tommy Perkins' 14th Amendment Claims, there is no evidence of class-based animus on the part of any of the defendants against Mr. Perkins or Ms. Perkins. The plaintiffs rely on nothing more than speculation and hunch that the Denham

Springs defendants' actions were motivated by racial animus. Speculation concerning bias is categorized properly as merely a "scintilla" of evidence, which is insufficient to present a question for the jury. Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969). Accordingly, the conspiracy claims by Tommy Perkins and Nathalan Perkins were properly dismissed.

CONCLUSION

The Fifth Circuit correctly found that the District Court did not abuse its discretion in declining to maintain supplemental jurisdiction over any of the Louisiana state law claims. Additionally, the District Court's judgment dismissing various federal claims brought by Tommy Perkins, Eddie Oliver and Nathalan Perkins were properly affirmed by the Fifth Circuit.

Because the petitioners fail to show compelling reasons for this Court's review of the Fifth Circuit's ruling, the petitioners' writ of certiorari should be denied.

Respectfully submitted:

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APPENDIX

APPENDIX

Petitioners' claims for violation of their constitutional rights and for conspiracy to violate their constitutional rights are brought pursuant to 42 U.S.C. §1983 and §1985. Section 1983 provides:

§ 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1985 provides, in pertinent part:

§ 1985. Conspiracy to interfere with civil rights

* * *

(3) Depriving persons of rights or privileges

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

The claims of Tommy Perkins which were dismissed on the respondents' motion for partial summary judgment were for alleged violations of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Louisiana Civil Code article 2315. Nathalan Perkins' claims which were dismissed on respondents' motion for partial summary judgment were for alleged

violations of the Fifth and Sixth Amendments to the United States Constitution, and La. Civ. Code art. 2315. The relevant constitutional amendments are as follows:

Amendment IV. Search and Seizure

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI. Jury trials for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV. Citizenship; privileges and immunities; due process; equal protection; appointment of representation; disqualification of officers; public debt; enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Further, petitioners invoked the district court's jurisdiction over

the state law claims pursuant to 28 U.S.C. §1367, which states:

> § 1367. Supplemental jurisdiction
>
> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> * * *
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Finally, the state law claims allege violations of La. Civ. Code art. 2315, which provides in pertinent part:

Art. 2315. Liability for acts causing damages

A. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

* * *

No. 01-1870

(3)

Supreme Court U.S.
FILED
2002
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In The
Supreme Court of the United States

ADRIENNE COBB, EDDIE OLIVER, TOMMY PERKINS, AND NATHALAN PERKINS,

Petitioners,

versus

ROBERT ROSHTO, RAYMOND E. HOLLOWAY, TERRY E. PITRE, MURPHY J. PAINTER, SAM GARAFOLA, UNKNOWN AIMEE, Agent, JEFF WESLEY, SCOTT JONES, and the CITY OF DENHAM SPRINGS, LOUISIANA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. May a federal court abuse its discretion in declining to exercise its jurisdiction pursuant to 28 U.S.C. §1367?

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Robert Roshto respectfully prays and herein appears to argue that a writ of certiorari should be denied in reviewing a judgment by the United States Court of Appeals for the Fifth Circuit in this case.

STATEMENT OF THE CASE

Relevant Proceedings Below

The case in chief was filed on July 9, 1998, in the Middle District Court, State of Louisiana before Judge Frank Polozola. That matter was realloted to Judge Ralph Tyson on August 10, 1998 and then reassigned but maintained in the Middle District to be handled by Judge Peter H. Beer of the Eastern District.

Each of the named defendants, through counsel, filed summary judgment motions. Defendant Robert Roshto filed a motion for summary judgment on the basis of prescription of claims or, in the alternative, qualified immunity. The District Court rendered a decision on July 10, 2000, granting summary judgment to Robert Roshto on the basis of prescription. The court then proceeded to address the remaining defendants' summary judgment motions, granting in part and denying in part the motions for dismissal. The court, pursuant to the discretionary rights granted to it through 28 U.S.C. § 1367, declined to exercise supplemental jurisdiction over all remaining claims, stating the remaining State claims predominated substantially over the remaining federal claims.

The United States Fifth Circuit Court of Appeals on March 26, 2002, docket number 00-31008, affirmed in part and reversed in part the District Court's judgment in this matter.

The Fifth Circuit reversed the summary judgment based upon prescription previously granted to Robert Roshto, stating that the state court proceedings did not appear to support the District Court's finding that the case was dismissed in state court by an exception of improper accumulation.

The Fifth Circuit addressed the remaining defendants' claims, affirming the District Court decision. Mr. Roshto was formally dismissed prior to the District Court examination of the qualified immunity claims and was therefore not a party to that judgment.

The Fifth Circuit affirmed the District Court's discretionary decision to remand all remaining claims to the State court, recognizing the discretion when such claims substantially predominate over federal claims. In that decision, the Court specifically noted the Roshto claims were back in the Federal Court prior to declining federal jurisdiction to hear the remaining claims. Petitioners filed for writ of certiorari of this court raising four issues. Question Number One – the discretionary authority to decline jurisdiction over remaining claims is the sole issue directly affecting Respondent Roshto, due to his dismissal on the basis of prescription prior to summary judgment evaluation on qualified immunity.

Relevant Facts

Respondent Robert Roshto was an employee and official of the Department of Public Safety & Corrections, Office of Alcoholic Beverage Control, which is an arm of the State of Louisiana. He is now retired. He served in the position as Deputy Counsel for the State Agency during the Administrative and court proceedings identified in the complaint. The dispute forming the basis of this action is petitioners' successive application for a liquor permit for its area business. There was an eventual granting of the license.

REASONS FOR DENYING THE PETITION

I. The Court of Appeals Correctly Upheld the District Court's Discretionary Right Granted Pursuant to 28 U.S.C. § 1367.

Petitioners seek this Court's reversal of the Fifth Circuit Court of Appeal's sustaining the discretionary powers of the district court and the right by law to assert such powers when the issues of state law substantially predominate in a case. The Fifth Circuit committed no reversible error in its affirmation of the District Court's exercise of such jurisdictional rights and the District Court has such discretion by law.

28 U.S.C. § 1367 provides the federal court has jurisdiction over supplemental matters which, in its discretion, may be accepted and consolidated with federal issues before it. As cited by the Fifth Circuit, *Bass vs. Parkwood Hospital*, 180 F.3d 234 (5th Cir. 1999) correctly identifies and provides a district court may decline to exercise supplemental jurisdiction over state law claims if they

substantially predominate over federal claims. The Fifth Circuit specifically noted in their decision that, "Taking into account our reversal of summary judgment for Roshto, the dozen or more state laws nevertheless continue to 'substantially predominate' in number, variety and complexity. The court did not abuse its discretion."

The Fifth Circuit's decision acknowledges and recognizes that the state law issues predominate, even when Roshto's motion for summary judgment previously granted on prescription alone is set aside.

Respondent also notes to this Court, previously raised in District Court, that respondent Robert Roshto is an official employee of the Department of Public Safety and Corrections, an arm of the State of Louisiana. As such, this particular defendant, in his official capacity is entitled to and afforded the protections of the Eleventh Amendment of the United States Constitution. Roshto when named in his personal capacity would also be entitled to qualified immunity, raised in his summary judgment motion but not reached by the Court.

The Eleventh Amendment bars monetary judgments against a sovereign state, absent consent or specific authorization by Congress given within its authority to so render. *Kimel, et al. vs. Florida Board of Regents, et al.*, Nos. 98-791, 98-792, 120 S.Ct. 631 (1/11/00). Any and all claims for monetary damages, in this case based on state rules, regulations, administrative procedures, etc., would be outside the jurisdiction of the federal court, further supporting the exercise of the court's discretionary rights to direct all parties to the state court in this proceeding.

Absent state consent, the Eleventh Amendment clearly bars pendent state claims. *See, Cantu vs. Rocha*, 77

F.3d 795 (5th Cir. 1996) and *Vermet vs. Howell*, 606 F.Supp. 732 (W.D. MI. 1994), wherein the court has acknowledged plaintiff's filing discrimination actions could not raise pendent claims arising under state civil rights laws. *See also, Raygor and Goodchild vs. Regents of the University of Minnesota*, 00-1514, 122 S.Ct. 999, 534 U.S. 533, 152 L.Ed. 2d 27 (decided 2/27/02), in which the court noted the grant of jurisdiction over supplemental and pendent claims does not extend to claims against non-consenting state defendants.

The District Court is afforded full discretion in determining whether to decline supplemental jurisdiction. This District Court did so, indicating that the non-federal issues are substantially disproportionate to the federal issues remaining. The Fifth Circuit, while upsetting one of the summary judgments against one of the defendants, stated the District Court properly exercised that discretion. That decision must be upheld and writ request denied.

Defendant Robert Roshto reiterates his sovereign state classification in fact removes jurisdiction of some of the remaining federal and state claims in the District Court, thereby further supporting the District Court and Fifth Circuit Court of Appeals' decisions.

CONCLUSION

The issue raised by petitioners does not merit consideration. The United States Court of Appeals for the Fifth Circuit properly upheld the District Court's determination to decline jurisdiction, based on their discretionary right, over the remaining matters pursuant to 28 U.S.C. § 1367.

Respondent's failure to address Questions 2, 3 and 4 do not herein indicate agreement with the issues presented and argued by petitioners. All other matters were ruled upon subsequent to Roshto's dismissal from this case and do not directly apply at this time. Petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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